Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

AUBREY E. HENRY,

Petitioner,

v.

JEFFERSON COUNTY PLANNING COMMISSION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN C. YODER
Counsel of Record
YODER LAW OFFICES
P.O. Box 940
Harpers Ferry, WV 25425
Telephone: (304) 535-6842

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

The lower court decided that a fee simple landowner applying for a permit to use his land does not have a property interest, and is therefore not entitled to substantive due process in the permitting process, stating: "We have made clear that when a 'land-use regulation[] grant[s] discretion to [government] officials with regard to approval of the proposed development, [a landowner] possess[es] no property interest protected by the Fourteenth Amendment.' *Gardner v. City of Baltimore*, 969 F.2d 63, 64 (4th Cir. 1992)."

1. Is a landowner seeking a permit entitled to substantive due process protection even when he does not have a "vested right" to the permit?

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Aubrey E. Henry ("Mr. Henry"), an individual.

Respondents: Jefferson County Planning Commission ("Commission"); Scott Coyle, Commission member, in his individual capacity; H. Richard Flaherty, Commission member, in his individual capacity; Paul Griger, Commission member, in his individual capacity; Sam Donley, Commission member, in his individual capacity; Jim Knode, Commission member, in his individual capacity; Ernie Benner, Commission member, in his individual capacity; Gilbert Page Wright, Commission member, in his individual capacity; Lyle Campbell Tabb, Commission member, in his individual capacity; Paul J. Raco, Director of Planning and Zoning, in his individual and official capacity; Jefferson County; and Jefferson County Board of Zoning Appeals.

No corporate entity issuing stock is a party to, or involved in this case, and therefore, there is no parent or publicly held company owning 10% or more of any issued stock.

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OPINION BELOW

The decision of the United States Court of Appeals for the Fourth Circuit, to which the petitioner seeks to file a Petition for a Writ of Certiorari, was rendered on May 7, 2002, and is reproduced in the Appendix ("A"). It is unpublished, but affirms the portion of the published district court opinion that raises the issue in question here. The decision of the district court in this case is published at *Henry v. Jefferson County Planning Commission*, 148 F. Supp. 2d 698 (N.D.W.Va. 2001), and is also reproduced in the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit, review of which is sought in this petition, was filed and entered on May 7, 2002. This Court granted a motion for extension of time to submit the petition, up to and including September 4, 2002. The petition for writ of certiorari has been timely filed. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42, United States Code, § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42, United States Code, § 3604, provides:

> [I]t shall be unlawful – (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

STATEMENT OF THE CASE

The petitioner, Aubrey E. Henry, is part owner of an 11.69 acre tract ("property") located near the town of Shepherdstown, West Virginia. He acquired 5 acres of that property in fee simple from his parents in 1979, who owned it before him, and had an option from his mother to buy the remaining 6.69 acres. The five acres owned in fee simple by Mr. Henry was in continuous commercial use by Mr. Henry or his parents, as a restaurant, for twenty (20)

years prior to the enactment of a zoning ordinance by Jefferson County in 1988.

In February of 1993 the restaurant burned down. After the fire, Mr. Henry had a conversation with Paul Raco, the Director of the Planning and Zoning Commission of respondent Jefferson County, inquiring about what kind of building permits he needed from the County to rebuild his restaurant. In this conference, Mr. Raco told Mr. Henry that he would not be able to gain approval for rebuilding his restaurant under the County's zoning ordinance enacted in 1988, because when the restaurant burned down, his land classification had reverted to agricultural, and there was no provision in the ordinance to continue the use of an existing business totally destroyed by fire. Further, Mr. Raco told him that he could not obtain a variance or re-zone, because he could not meet setback requirements, and that for that reason, as well as others, any request for a variance or to re-zone to rebuild the restaurant would be denied. Instead, Mr. Raco informed Mr. Henry that he should submit alternative plans to build townhouses, since that use qualified under the County's zoning ordinance. Mr. Raco further told Mr. Henry that once the townhouses were approved, he could then qualify for rebuilding his restaurant, since he would not then be going from vacant agricultural land to commercial use, but from residential townhouses to commercial use.

Relying upon Mr. Raco's representations, petitioner filed an application with the Commission for a conditional use permit to build seventy-six (76) townhouses ("project") on the property in 1994. Under the Jefferson County Zoning and Development Review Ordinance ("Ordinance") adopted in 1988, the property is zoned as a Rural-Agricultural District. In the Rural-Agricultural District,

townhouses are allowed, after obtaining a conditional use permit, based upon an objective point scoring system, known as the Development Review System ("system"). Under the system, various factors are weighted on a numerical basis relative to their importance as an indicator of a parcel's agricultural significance or its development potential. A score of 60 points or less advances the application to the next stage, consisting of public hearings.

On March 23, 1994, after a favorable score of 39.04 on this objective point scoring system, the Commission advanced petitioner's application to the public hearing stage. At a subsequent public hearing, a crowd of more than 80 people showed up to protest the granting of the permit, because low income people would live there and use the public park next to the project.

A leading opponent of the issuance of the permit testified that her opposition, and public opposition, was based upon a fear that "lower income," "single family parents" and "large families" might move into the area. The Commission had already saddled the project with conditions designed to keep these "lower income" families out of, and from using the publicly-operated park next door. These conditions included erecting fences to keep residents from going into the publicly-operated park, requiring yearly monetary fees to be paid to the park, and putting a restrictive covenant into the deed of each townhouse notifying the resident that he could not use the public park.

The protesting crowd was out-of-control, and shouted down Mr. Henry whenever he tried to speak in his defense. Mr. Henry stated he was afraid for his life, with members of the crowd making threatening remarks about harming

him physically. After failing to bring the protesting crowd under control, the Commission denied the permit referring to the danger the project would create for the neighboring publicly-operated park. The real reason for denial was the strong and vocal opposition of an uncontrollable and unruly crowd that opposed the project out of a fear that single parents and large families would live there, as well as use the neighboring park operated by respondent Jefferson County,

Mr. Henry filed a lawsuit in district court pursuant to 42 U.S.C. § 1983, contending among other things that the denial of his permit, for arbitrary and capricious subjective reasons, where he qualified for it on the objective point scoring system, violated his substantive due process rights. As part of his contention that the denial was arbitrary and capricious, he contended that denial of the project because single parents, and large families would live there, also violated the provision of the Fair Housing Act set forth at 42 U.S.C. § 3604(b), which prohibits discrimination based upon "familial status." *Id.*

The district court dismissed Mr. Henry's substantive due process claim upon a motion for summary judgment, ruling that he did not have a property interest in the conditional use permit because the Commission had substantial discretion to deny the permit. In ruling that Mr. Henry did not have a protected property interest, the district court relied upon the Fourth Circuit case of *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992). *Henry,* 148 F. Supp. 2d at 713-14, A-45.

On appeal, the Fourth Circuit affirmed the dismissal, also citing and relying upon *Gardner*, stating:

> We have made clear that when a "land-use regulation[ ] grant[s] discretion to [government] officials with regard to approval of the proposed development, [a landowner] possess[es] no property interest protected by the Fourteenth Amendment." *Gardner v. City of Baltimore*, 969 F.2d 63, 64 (4th Cir. 1992).

A-10.

REASONS FOR GRANTING THE WRIT

I

THE COURT HAS ALREADY GRANTED CERTIORARI ON THE SAME ISSUE FOR THE OCTOBER TERM

The Court recently granted certiorari on essentially the same due process issue as the one involved here in the case of *City of Cuyahoga Falls, OH et al. v. Buckeye Community Hope Foundation,* No. 01-1269, on June 24, 2002 ("*Buckeye* case"). Accordingly, the Court should also **GRANT** certiorari in the instant case involving the same due process issue, or at the very least, **HOLD** this case until a decision is rendered in the *Buckeye* case.

The Sixth Circuit *Buckeye* due process issue now under review by this Court in the October Term is published at *Buckeye Community Hope v. City of Cuyahoga Falls,* 263 F.3d 627, 641-643 (6th Cir. 2001). As with the instant case, the *Buckeye* due process issue on review here revolves around the Fourth Circuit case of *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992) ("*Gardner* case"). The due process issue that the

Court decided to review in the October term in the *Buckeye* case is stated as follows:

> Does the Due Process Clause of the constitution require a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?

(*Buckeye* Petition for Writ of Certiorari, p. i). Although phrased differently than the way the issue is phrased by the petitioner in the instant case, the due process issue in the *Buckeye* case and the instant case are really the same. In its Petition for Writ of Certiorari in the *Buckeye* case, the petitioner relies upon the Fourth Circuit *Gardner* case as the basis for requesting this Court to review the due process issue. (*Buckeye* Petition for Writ of Certiorari, pp. 12-13). In their Opposition to the Petition for a Writ of Certiorari in the *Buckeye* case, the respondents also cite the *Gardner* case. (*Buckeye* Opposition to Petition for Writ of Certiorari, pp. 8, 10). Thus, the *Gardner* case is the key case in the due process issue that this Court has agreed to consider in reviewing the *Buckeye* decision in the October term.

Similarly, in the instant case for which the petitioner seeks review, both the Fourth Circuit, as well as the district court below, relied upon the *Gardner* case. A-10 and *Henry,* 148 F. Supp. 2d at 713-14, A-45. In the instant case, the Fourth Circuit determined that petitioner, a fee simple landowner, and an applicant for a conditional land use permit for his land, did not have a property interest in the use of his land, citing *Gardner* as a precedent. The Fourth Circuit stated:

> We have made clear that when a "land-use regulation[ ] grant[s] discretion to [government] officials with regard to approval of the proposed development, [a landowner] possess[es] no property interest protected by the Fourteenth Amendment." *Gardner v. City of Baltimore*, 969 F.2d 63, 64 (4th Cir. 1992).

A-10. Based upon the Fourth Circuit's decision in the instant case, relying upon the *Gardner* case, the following issue is thus presented here for review: Is a landowner seeking a permit entitled to substantive due process protection even when he does not have a "vested right" to the permit?

With respect to this issue, there is a serious conflict between the Federal Circuit Courts of Appeals as to whether the protections afforded by the Due Process Clause attach to landowners seeking permits to make reasonable use of their property. As discussed *infra*, the Third and Seventh Circuit Courts of Appeals have held that when government imposes restrictions on the use of real property, government proceedings to impose those restrictions must be conducted in accordance with the Due Process Clause. On the other hand, the Second, Fourth, Sixth, and Eleventh Circuit Courts of Appeals hold that a landowner is entitled to due process only *after* the owner has obtained an "entitlement" or "vested right" to the permit at issue.

II

THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A SERIOUS CONFLICT AMONG THE CIRCUITS

The stark conflict among the lower courts over the property interest protected by the Due Process Clause of the Fourteenth Amendment in land use cases is both pervasive and long-standing. On one side of the conflict are the Third and Seventh Circuits, and possibly the Ninth Circuit, that find, or implicitly assume, a protected property interest in land ownership. The Seventh Circuit decision in *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994), highlights the conflict.

River Park, Inc. owned land in the City of Highland Park that was zoned for one house per three acres. *River Park*, 23 F.3d at 165. River Park decided to build a subdivision on its property requiring an increase in housing density. *Id.* River Park requested a re-zone. *Id.* However, the city engaged in delaying tactics and failed to make a decision on the re-zoning application. *Id.* The application expired and River Park was directed to refile. *Id.* By this time, however, River Park was bankrupt. *Id.* River Park then filed a Section 1983 claim alleging the city violated its procedural due process rights. *Id.* The District Court dismissed the complaint, ruling that River Park lacked a "legitimate claim of entitlement" to the new zoning it sought. *Id.* Although the Seventh Circuit ruled against River Park on the merits of its claim, the court went to great lengths to identify a protected property interest in River Park's ownership of its land:

> For the reasons the district court gave, River Park may well have lacked a property interest in

> one classification rather than another. But it surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process. The references to property in the Constitution reflect its Lockean heritage. The founding generation viewed "property" in concrete terms – land and chattels acquired by the investment of effort or purchase from another. An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the property interest but are legal ***restrictions*** on the use of property. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365 . . . (1926). Licenses, permits, and classifications are important to owners because they reflect governmental promises not to interfere with private uses of property, but let us not confuse a decision not to intervene with the property itself.

Id. at 165-66 (emphasis in original).

River Park is consistent with this Court's finding in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987):

> But the right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a "government benefit."

Id. at 833 n. 2. *See also State of Washington ex rel. Seattle Title Trust Company v. Roberge*, 278 U.S. 116, 121 (1928) (In a due process challenge to a land use regulation the court held: "The *right* of the trustee to devote its land to *any legitimate use* is properly within the protection of the Constitution." (Emphasis added.)); *Nectow v. Cambridge*,

277 U.S. at 188 (in this due process case "governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited"). In these cases, it is not so much that vested permit rights are protected, but the ability of a landowner in *obtaining those permit rights in the first place* must be accorded some degree of due process protection; the owner cannot be thwarted by governmental actions that are illegitimate or based upon improper government action. The protected property interest was not a permit to build but, as was stated by the Supreme Court in *Nollan*, the right to put the property to reasonable use.

Because the right to build on property, subject to reasonable limitations, is an interest protected under the Due Process Clause, it is not necessary to rely on such cases as *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972), which *extended* Fourteenth Amendment protections beyond actual ownership of real estate, chattels, or money. In the instant case, however, much weight was placed on *Roth* as a limitation of due process rights to interests in real property. *See, e.g., Henry*, 148 F.Supp.2d at 711 n. 150, A-39. *Roth*, however, dealt with the extension of due process to what some commentators have called "new" property rights, e.g., employment contract rights.[1]

In extending due process protections to such "new" property, this Court was careful to limit that extension

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[1] *See generally* Charles Reich, *The New Property*, 73 YALE L. J. 733 (1964).

only to those new property rights that actually existed – those that had some sort of vesting to them. But, the Circuit Courts on the other side of the split surmise that *Roth* also stands for the proposition that with respect to long-established property rights, due process similarly attaches only to vested permits, rather than the fundamental underlying right to use property. Rejecting that argument, the Ninth Circuit explained in *Schneider v. California Department of Corrections*, 151 F.3d 1194, 1200-02 (9th Cir. 1998) (footnotes omitted):

> The State's reliance upon *Roth*, however, is misplaced. Understood in proper context, it is clear that *Roth* stands not for a theory of plenary state control over the definition and recognition of compensable property interests, as the State assumes, but for a much more modest proposition. *Roth* was a so-called "new property" case; in it, the court considered the circumstances under which state law might serve to elevate certain nontraditional forms of property – such as public employment, welfare assistance, state contracts and licenses, and other government largesse – to constitutional status. The *Roth* Court's recognition of the unremarkable proposition that state law may affirmatively *create* constitutionally protected "new property" interests in no way implies that a State may by statute or regulation *roll back* or *eliminate* traditional "old property" rights. . . . Rather, there is, we think, a "core" notion of constitutionally protected property into which state regulation simply may not intrude. . . . The States' power vis-a-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer "new property" status on interests located outside the core of constitutionally protected property, but they

> *may not* encroach upon traditional "old property" interests found within the core. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 329 (1993). Were the rule otherwise, States could unilaterally dictate the content of – indeed altogether opt out of – both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts.

Id.[2] This analysis is buttressed by another recent decision by this Court, *Palazzolo v. Rhode Island*, 533 U.S. ___, 121 S. Ct. 2448 (2001). In context of analyzing a Takings Clause claim, the Court reiterated the fundamental nature of property and the understanding that the right to use property is not a boon granted by the government that can be taken away through artifice. It rejected the state's theory that:

> Property rights are created by the State. . . . So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> *The State may not put so potent a Hobbesian stick into the Lockean bundle.*

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[2] It is not clear today which side of the circuit split the Ninth Circuit is on. Although this language in the *Schneider* case appears to align it with the Third and Seventh Circuits, the case of *Bateson v. Geisse*, 857 F.2d 1300, 1305 (9th Cir. 1988), decided ten years earlier, would place the Ninth Circuit on the other side of the split with the Second, Fourth, Sixth, and Eleventh Circuits.

Id., 121 S. Ct. at 2462 (emphasis added). In the context of the Due Process Clause, the lesson is clear: the right to own and use property is protected by the Constitution; limitations upon that right through the permitting process are not limited to just those vested development rights "created by the State."

Consistent with this line of reasoning, the Third Circuit sets forth what Mr. Henry contends is the correct standard in the case of *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995). In *DeBlasio*, the Third Circuit had to consider the due process claims of a landowner who sought a variance for a nonconforming use. Reversing the trial court's granting of summary judgment in favor of the township as to plaintiff's due process claim, the Third Circuit held:

> [O]wnership is a property interest worthy of substantive due process protection. Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly *established possession of a property interest worthy of substantive due process protection.*

Id. at 600-01 (citations and footnotes omitted) (emphasis added).

Nevertheless, the Second, Fourth, Sixth, and Eleventh Circuits stand on the other side of the conflict. These courts use this Court's holding in *Roth* to find a protected property interest only when the landowner can establish he is "entitled" to a so-called benefit, such as in a permit or a particular land use.

In the Second Circuit, in the case of *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911(2d Cir. 1989), the court traced the development of property interests for both procedural and substantive due process purposes and concluded the Supreme Court has always assumed a protected property interest in land ownership. The Second Circuit, however, then decided it was compelled by its own precedent to apply the *Roth* "entitlement" test, rather than follow the precedent already established by the Supreme Court. *Id.* at 917-18.

In the Fourth Circuit, the court cited *Gardner, supra,* as a precedent, for holding that Mr. Henry did not have a property interest in the instant case, stating:

> We have made clear that when a "land-use regulation[ ] grant[s] discretion to [government] officials with regard to approval of the proposed development, [a landowner] possess[es] no property interest protected by the Fourteenth Amendment." *Gardner v. City of Baltimore*, 969 F.2d 63, 64 (4th Cir. 1992).

A-10. In another Fourth Circuit case, *Sylvia Development Corp. v. Calvert County, Maryland*, 48 F.3d 810 (4th Cir. 1995), a property owner claimed a procedural due process violation for unfair denial of a re-zoning application. The Fourth Circuit did not look to the property owner's interest in the land but relied on *Roth* and concluded the

property interest must be found in the permit sought by establishing a claim of entitlement. *Id.* at 825-26.

Similarly, in the Sixth Circuit case of *Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995), the plaintiff challenged on substantive due process grounds the denial of a special use permit to build condominiums on its lots. Triomphe argued that the only property interest requirement is ownership of the property. However, as in the case at bar, the Sixth Circuit held Triomphe must establish a claim of entitlement to the actual permit. *Id.* at 202-03.

And, in the Eleventh Circuit case of *Marine One, Inc. v. Manatee County*, 877 F.2d 892, (11th Cir. 1989), a landowner sued the county for substantive due process violations alleging the county's rescission of permits authorizing the construction of a marina deprived the landowner of a property interest without compensation. The Eleventh Circuit held the landowner did not have a protected property interest in the building permits and was not entitled to due process protections. *Id.* at 894-95.

The reason for this conflict among the circuits is elusive. Although this Court as a matter of practice has applied due process review to restrictions imposed on the use of property, this Court has never *expressly* defined the protected property interest in a land use case. *See, e.g., Dobbins v. City of Los Angeles*, 195 U.S. 223 (1904); *Welch v. Swasey*, 214 U.S. 91 (1909); *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365; *Gorieb v. Fox*, 274 U.S. 603 (1927); *Zahn v. Board of Public Works of the City of Los Angeles*, 274 U.S. 325 (1927); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *State of Washington ex rel. Seattle*

Title Trust Co. v. Roberge, 278 U.S. 116 (1928); and *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976).

The conflict between the Third and Seventh Circuits on the one hand and the Second, Fourth, Sixth, and Eleventh Circuits, on the other, is the very type of conflict that demands resolution by this Court. It causes confusion and results in contradictory enforcement of the law. For this reason, this Court should **GRANT** the writ of certiorari. In the alternative, this case should be placed on **HOLD** for the Court's decision in *Buckeye*, No. 01-1269, certiorari granted on June 24, 2002.

III

WHETHER LANDOWNERS SEEKING A PERMIT HAVE A PROTECTED PROPERTY INTEREST IN THEIR LAND FOR DUE PROCESS PURPOSES UNDER THE FOURTEENTH AMENDMENT IS AN IMPORTANT QUESTION OF LAW SUBJECT TO REPETITION NATIONWIDE

As with any other real property owner, Mr. Henry has a constitutional right to the reasonable use of his property.

> Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. . . . Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.

Buchanan v. Warley, 245 U.S. 60, 74 (1917). The conditional use permit Mr. Henry sought is a restriction on the use of his land. However, in reliance on this Court's "entitlement" test

in *Roth,* the Fourth Circuit characterized these permits as a government benefit to which Mr. Henry was not entitled, and therefore, had no property interest protected by the Fourteenth Amendment. A-10. But, the "entitlement" test is inapplicable in a land use case such as this.[3] The relevant property interest was not in the permits sought by Mr. Henry, but in the land Mr. Henry owned and has used for non-agricultural purposes for 20 years before the zoning ordinance was ever enacted into law. Under the Fourteenth Amendment, therefore, Mr. Henry was entitled to due process. This Court's decision in *Roth* actually supports this conclusion and undercuts the lower court's ruling.

In *Roth*, this Court determined an untenured assistant professor had no protected property interest in continuing employment and was, therefore, not entitled to a hearing for cause when the university declined to renew his contract of employment. There was no constitutional or statutory right to be employed by the government and the professor's terms of employment did not provide for

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[3] The court below found that because the Commission had some discretion in granting the permit, Mr. Henry did not have a property interest and thus due process did not attach. A-10. The court, however, failed to recognize that as long as *some* standards applied to the decision-making process and as long as the Commission does not have *total* discretion, *some* substantive due process should apply to at least make sure applicable guidelines are followed. The court below recognized that the Commission's discretion was limited or "guided by the process and factors enumerated in the zoning ordinance," e.g., the objective point system that Mr. Henry qualified under. A-10. What happens when officials, as in the instant case, fail to follow and comply with guidelines, and deny the permit for an improper or illegal purpose?

contract renewal absent "sufficient cause." *Roth*, 408 U.S. at 578. There was no state statute or university rule or policy that secured the professor's interest in re-employment or that created any legitimate claim to it. *Id.* At most, this Court reasoned, the professor had an abstract concern in being rehired, but he did not have a property interest sufficient to require the university to give him a hearing. *Id.*

In *Roth*, this Court established a standard for determining a protected property interest in a government benefit so as to define the outside limits of procedural due process. As this Court stated, "When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." *Roth*, 408 U.S. at 569-70. Thus, for certain benefits, this Court employed a test requiring the plaintiff to establish a "legitimate claim of entitlement." *Id.* at 577. This Court did not, however, redefine property interests protected by the Fourteenth Amendment that do not derive from a government benefit. As to such interests, this Court made only a passing, but significant, reference: "The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 571-72. In this language, this Court recognizes an already established protected property interest in "actual ownership of real estate." It is this interest to which Mr. Henry lays claim.

The significance of *Roth*, and its recurring misapplication, is aptly explained in the Second Circuit case of *RRI Realty*, 870 F.2d at 911. As the Second Circuit explained, the initial effort to subject local land use decisions to constitutional scrutiny involved challenges to new zoning

restrictions imposed upon property owners. *Id.* at 914. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning regulation upheld). However:

> [I]n the early zoning cases, there was no dispute as to whether the plaintiff had a property interest within the meaning of the Fourteenth Amendment; his property interest was in the land he owned, land that the local regulating body sought to restrict as to use.

RRI Realty, 870 F.2d at 915.

The Second Circuit explains further that the next phase of land regulation cases involved applications from property owners to obtain a change in existing zoning and that the analytical framework of constitutional challenges to land use regulation was affected by this Court's 1972 decisions in *Roth* and *Perry v. Sinderman*, 408 U.S. 593 (1972). *RRI Realty*, 870 F.2d at 915. According to the Second Circuit, both decisions were potentially pertinent to land use regulation in their pronouncement that a property interest, within the meaning of the Fourteenth Amendment, includes "not only what is owned but also, in some limited circumstances, what is sought." *Id.* at 915. Therefore, these cases expanded rather than diminished the concept of property under the Fourteenth Amendment. *Id.*

Nevertheless, after 1972, some courts considering constitutional challenges to land use regulation began citing *Roth* and asking whether the applicant had a "clear entitlement" to the approval sought from the land use regulating body. *Id.* at 915. In telling summation, the Second Circuit concludes:

> It is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exits in what has been applied for – whether a zoning variance, a business license, or a building permit – instead of simply recognizing the owner's indisputable property interest in the land he owns.

Id. at 917.

Through a misapplication of *Roth*, some lower courts – including many Circuit Courts of Appeals and the Fourth Circuit in this case – have distorted due process law so as to deny land owners, like the Mr. Henry, the constitutional protections to which they are entitled. With this petition this Court has an opportunity to clarify a trend that has disturbed at least one member of this Court:

> [T]he Court has increasingly emphasized the creation and delineation of entitlements in recent years; it has not always placed sufficient stress upon the protection of individuals' traditional rights in real property.

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (Thomas, J., concurring and dissenting).

The lower court has in effect established a virtually unsurmountable barrier for a fee simple property owner to establish that he is entitled to due process procedures in any attempt he makes to obtain a permit to use his property. First, before he is entitled to due process, he must show he is entitled to the permit by obtaining it. If that happens, of course, there is no reason for him to bring a cause of action alleging a due process violation, since he has already obtained the permit he is seeking.

On the other hand, if the governing body denies the lawsuit for arbitrary and capricious reasons, contrary to an established objective point system, for reasons that are clearly contrary to law, the landowner is not entitled to due process in the processing of his permit application because he has no property interest in the use of land he owns in fee simple. The effect is to emasculate and eliminate the Due Process Clause as a vehicle to remedy the illegal, wrongful, arbitrary, or capricious denial of a permit for a fee simple landowner to make use of his land in any situation where a permit is required.

This is the irony. A fee simple land owner like Mr. Henry, whose family operated a commercial restaurant on his land for 20 years before the zoning ordinance restricting its use was passed, can have the use of his land taken away without any due process rights at all, because he supposedly does not have a property interest in the use of his land. On the other hand, a recipient of welfare benefits is entitled to due process before the benefits can be taken away. *See Goldberg v. Kelly*, 397 U.S. 254, 261-63 & n.8 (1970) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'"). This double standard makes a landowner a second class citizen in comparison to a welfare recipient, who receives a higher degree of due process protection under the constitution than a landowner under the Fourth Circuit's application of the law. Surely, the Founding Fathers could not have contemplated such an illogical outcome, that defies common sense, where a welfare recipient has a property interest, while a businessman who owns his land in fee simple does not have a property interest in the continued non-agricultural use of his land after using his land for non-agricultural business purposes for 20 years.

The right to make reasonable use of real property is a fundamental attribute of this Nation's character. It is a core principle of our Constitution and one that has made this Nation unique – both in terms of our economic lives and in our ability to maintain individual autonomy. As this Court has aptly noted, our liberty is inseparable from our rights in property. *Lynch v. Household Finance,* 405 U.S. 538, 552 (1972). And while it is perfectly appropriate that the right to use property be subject to reasonable government regulation and restrictions in furtherance of public health, safety, and general welfare, such restrictions must be imposed with some modicum of fairness and due process. But the court below holds that the right to due process attaches only *after* one obtains a vested right or entitlement to the permit being sought.

Many businesses and individuals own property in numerous jurisdictions and are subject to a myriad of complex, often onerous, land *restrictions* that hinder or stymie productive use of their land. These entities should not be subject to uncertain or inconsistent application of federal law.

Only this Court can reaffirm the constitutional protections the Fourteenth Amendment affords landowners nationwide and only this Court can clarify the meaning of this Court's *Roth* decision. To resolve this question, therefore, this Court should **GRANT** the petition for writ of certiorari, or at least place this case on **HOLD** pending the Court's decision in *Buckeye*, No. 01-1269, certiorari granted June 24, 2002.

CONCLUSION

The federal courts must understand that reasonable use of one's property is a constitutional right and that a building permit is a restriction on that right subject to the procedural due process protections of the Constitution. It is not a privilege to be meted out by a parsimonious and whimsical government. For the reasons stated above, the Court should **GRANT** this petition for writ of certiorari. In the alternative, this case should be placed on **HOLD** for the Court's decision in *Buckeye*, No. 01-1269, certiorari granted June 24, 2002.

DATED: September 4, 2002.

Respectfully submitted,

JOHN C. YODER
YODER LAW OFFICES
P.O. Box 940
Harpers Ferry, WV 25425
Telephone: (304) 535-6842

Attorney for Petitioner

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

AUBREY E. HENRY,

Plaintiff-Appellant,

v.

THE JEFFERSON COUNTY PLANNING COMMISSION; SCOTT COYLE, Commission Member, in his individual capacity; H. RICHARD FLAHERTY, Commission Member, in his individual capacity; PAUL GRIGER, Commission Member, in his individual capacity; SAM DONLEY, Commission Member, in his individual capacity; JIM KNODE, Commission Member, in his individual capacity; ERNIE BENNER, Commission Member, in his individual capacity; GILBERT PAGE WRIGHT, Commission Member, in his individual capacity; LYLE CAMPBELL TABB, Commission Member, in his individual capacity; PAUL J. RACO, Director of Planning and Zoning, in his individual and official capacity; JEFFERSON COUNTY; JEFFERSON COUNTY BOARD OF ZONING APPEALS,

Defendants-Appellees,

and

No. 01-1948

STATE OF WEST VIRGINIA,

Defendant.

PACIFIC LEGAL FOUNDATION,

Amicus Curiae.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. W. Craig Broadwater, District Judge. (CA-96-40-3, CA-99-25-3)

Argued: February 28, 2002

Decided: May 7, 2002

Before WILKINSON, Chief Judge, and NIEMEYER and MICHAEL, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: James Sherman Burling, PACIFIC LEGAL FOUNDATION, Sacramento, California, for Amicus Curiae. Michael Douglas Lorensen, BOWLES, RICE, MCDAVID, GRAFF & LOVE, P.L.L.C., Martinsburg, West Virginia, for Appellees. John Christian Yoder, Harpers Ferry, West Virginia, for Appellant.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The Jefferson County Planning and Zoning Commission denied, by unanimous vote, Aubrey Henry's application for a conditional use permit to build a 76-unit townhouse development on 9.8 acres of land in Jefferson County, West Virginia. Henry sued the Commission and others, asserting that the local zoning ordinance was unconstitutionally vague on its face and that the denial of the permit to build the townhouse project amounted to an unconstitutional taking of his property without just compensation and violated his due process and equal protection rights. The district court granted summary judgment to the defendants on the vagueness challenge to the zoning ordinance and dismissed Henry's other claims on the grounds of *Burford* abstention. In reviewing that decision in an earlier appeal, we affirmed the ruling that the ordinance was not unconstitutionally vague, vacated the dismissal of the remaining claims, and remanded for further proceedings. The district court then granted summary judgment to the defendants on these remaining claims, and Henry appeals for a second time. He is joined by the Pacific Legal Foundation as amicus curiae. We now affirm the district court's grant of judgment to the defendants on the substantive due process claim and vacate the judgment on the takings claim because the latter claim is not ripe for review.

I.

Aubrey Henry is part owner of a 13.69-acre tract of land located in Jefferson County, West Virginia. Henry

owned and operated a restaurant on this property beginning in 1979, when he took over the restaurant from his parents. In 1988 Jefferson County enacted a new Zoning Development and Review Ordinance which zoned the property as a Rural-Agricultural District. Henry's restaurant was a non-conforming use under the new ordinance, but he was permitted to continue operating the restaurant under a grandfather clause. In 1993 the restaurant burned to the ground. Henry discussed rebuilding the restaurant with Paul Raco, the Director of the Jefferson County Planning and Zoning Commission. According to Henry, Raco told him that he should not bother applying for a permit to rebuild the restaurant because he would not be able to satisfy a number of necessary conditions. Instead, Raco allegedly told Henry to submit an alternative plan to build townhouses. If this was approved, then supposedly it would be easier for Henry to get approval at a later time to rebuild his restaurant.

Allegedly in reliance on this advice, Henry in early 1994 sought a conditional use permit for a 76-unit townhouse project on 9.8 acres of the property. Because the land had reverted to agricultural use after the restaurant burned down, Henry's proposed use was not allowed as of right. Henry properly sought a conditional use permit under Jefferson County's Development Review System. After processing Henry's proposal according to this system, the Commission unanimously voted to deny the permit. The Commission denied the permit based on the project's high housing unit density (which was much greater than the density in the surrounding area), its effect on the adjacent park, and its general incompatibility with the neighborhood.

Pursuant to state law procedure, Henry appealed this decision to the Jefferson County Board of Zoning Appeals. The Board affirmed the Commission's findings and decision. Henry then challenged the Board's decision through the West Virginia state court system. He sought certiorari in state circuit court, which affirmed the Commission's decision. Henry then sought review in the Supreme Court of Appeals of West Virginia, which remanded the case to the Board with instructions that the Board support its decision with more thorough fact-finding. The Board gave Henry the opportunity to present more evidence, but Henry requested instead that the Board expedite the decision without another hearing. The Board then issued a six-page decision affirming the denial. The Board concluded that the Zoning Commission had properly followed the public hearing procedures set out in the ordinance. It also concluded that the proposed development, with a density of 7.75 housing units per acre, was incompatible with the relative density of the surrounding area, which consisted mainly of one single family home per two acres or more of land. The Board found the proposed development incompatible with the purpose of the Rural-Agricultural District, which was intended "to provide a location for low density single family residential development in conjunction with providing continued farming activities" and "to preserve the rural character of the County and the agricultural community." Jefferson County, W.Va., Zoning and Development Review Ordinance § 5.7 (1988). Henry again sought certiorari in the circuit court, which affirmed the Board's decision. The Supreme Court of Appeals of West Virginia denied review. Throughout this state review process, Henry challenged the legal and factual sufficiency of the Commission's decision. At no time during this process did Henry seek compensation for the denial of his

permit. *See, e.g., Henry v. Jefferson County Planning Comm'n,* 496 S.E.2d 239 (W.Va. 1997).

Henry also brought suit in federal district court, challenging the constitutionality of the ordinance, alleging an unconstitutional taking of his property, and claiming due process and equal protection violations. As noted above, we affirmed the district court's ruling that the ordinance was not unconstitutionally vague in a prior appeal, but we remanded Henry's remaining claims for further proceedings. On remand, the district court granted summary judgment to the defendants on these claims. Henry now appeals the district court's ruling on his takings and substantive due process claims, but he does not appeal the court's ruling on the equal protection claim.

II.

We first address Henry's takings claim. The Takings Clause of the Fifth Amendment to the Constitution, applicable to the states through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. As the Supreme Court has explained, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194 (1985). Thus, the mere taking of a landowner's property does not violate the Fifth Amendment; the violation occurs only when the property is taken *and* the landowner has been denied just compensation. That is to say, "the property owner cannot claim a violation of the Just Compensation Clause until [he] has used [State compensation] procedure[s] and been

denied just compensation." *Id.* at 195. So long as the state provides a "reasonable, certain and adequate provision for obtaining compensation," a landowner's takings claim is not ripe until he has exhausted state compensation procedures.[1] *Id.* (quotations omitted).

Here, Henry has not pursued state compensation procedures, nor does he present evidence that there is no such procedure available. If the West Virginia courts had

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[1] With regard to exhaustion in takings claims, it is important to distinguish between *Williamson*'s "final decision" requirement and its "just compensation" requirement. A takings claim is "not ripe until the government entity charged with implementing the [challenged] regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186. However, once a final decision has been reached by the initial decisionmaker, a landowner need not exhaust state procedures for review of that final decision in order to ripen a takings claim. *Id.* at 192-94. Here, Henry has in fact exhausted state procedures for reviewing the Commission's denial of his conditional use permit. While he did not need to pursue such review in order to satisfy *Williamson*'s "final decision" requirement, we do not suggest that pursuing state review is a pointless or unadvisable course of action. Indeed, in this case the Supreme Court of Appeals of West Virginia required the Board of Zoning Appeals to justify its conclusions with more extensive fact-finding, even though the permit denial was ultimately upheld. State review provides a valuable check on potentially arbitrary local decisionmaking and is often a better course of action than immediately seeking federal review. We simply note that exhausting state procedures to review a "final decision" is not required to ripen a federal takings claim. In contrast, a landowner must exhaust state compensation requirements in order to demonstrate that a Fifth Amendment violation has occurred. As stated above, while Henry did exhaust state procedures to review the Commission's decision, he did not seek compensation during that process. *Cf. McFillan v. Berkeley County Planning Comm'n*, 438 S.E.2d 801 (W.Va. 1993) (considering takings claim raised during the course of review of Commission's decision).

made clear that no state process exists for seeking compensation in these circumstances, then Henry could plausibly claim that he had been denied just compensation. Likewise, if a state compensation process existed but the West Virginia courts had made clear that, for example, a landowner is never entitled to compensation for zoning restrictions on property, then Henry could claim that he had been denied just compensation without having to pursue a clearly meritless claim. *See Naegele Outdoor Advertising, Inc. v. City of Durham,* 803 F.Supp. 1068, 1072-73 (M.D.N.C. 1992) (takings claim ripe because prior North Carolina court decisions made clear that no compensation was due when a challenged ordinance contained an amortization period), *aff'd,* 19 F.3d 11 (4th Cir. 1994) (per curiam), *cert. denied,* 513 U.S. 928. While it appears that West Virginia does not have a statutory inverse condemnation procedure, a West Virginia landowner, at least in some circumstances, may seek compensation for damage to property by bringing a mandamus action against a state official to compel that official to institute statutory eminent domain proceedings. *See Shaffer v. West Virginia Dep't of Transp.,* 542 S.E.2d 836 (W.Va. 2000); *Carter v. City of Bluefield,* 54 S.E.2d 747 (W.Va. 1949). We do not speculate as to whether mandamus would be available in this particular case; it is enough to observe that the West Virginia courts have generally recognized this compensation procedure in the past and that Henry has not demonstrated that the procedure is unavailable in this case. Accordingly, Henry has not established that his property has been taken *without just compensation.*

Because the Fifth Amendment only prohibits the taking of property without just compensation, Henry's takings claim is not ripe and must be dismissed without prejudice.[2]

III.

Henry also claims that the Commission's denial of his conditional use permit constituted a violation of his substantive due process rights. To establish this, Henry must demonstrate: (1) that he had a property interest in

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[2] Commentators have criticized the use of the term "ripeness" to describe the "just compensation" requirement, stating that "the ripeness label gives the erroneous impression that litigation in state court will ripen a federal takings claim. In reality . . . preclusion and the *Rooker-Feldman* doctrine often will bar federal court relitigation." Douglas T. Kendall et al., *Choice of Forum and Finality Ripeness: The Unappreciated Hot Topics in Regulatory Takings Cases*, 33 Urb. Law. 405, 409 (2001). *See also* Julian C. Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* 450-51 (1998). The point is well taken. A determination that a claim is unripe often suggests that a litigant will eventually be able to return to federal court for a decision on the merits. Litigants should be aware that in the context of takings jurisprudence, a dismissal for ripeness does not imply that the litigant will eventually have the opportunity to litigate the merits of their takings claim in federal court. Often, by the time a federal takings claim is ripe, it is also precluded from being litigated. *See Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 72 (1995) ("Ironically, an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight."). Nevertheless, the Supreme Court has referred to the "just compensation" predicate as a ripeness requirement, *see Williamson*, 473 U.S. at 194, and we think the term, despite its potentially misleading connotations, most accurately explains why Henry's claim cannot be considered on the merits at this stage. State court litigation does ripen the federal claim; any subsequent bar to federal court litigation would not be a ripeness bar, but a claim or issue preclusion bar.

his proposed project; (2) that the state deprived him of this interest; and (3) "that the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency." *Sylvia Development Corp. v. Calvert County,* 48 F.3d 810, 827 (4th Cir. 1995).

In this case, Henry has failed to establish that he possesses a property interest in the conditional use permit to build the townhouses. We have made clear that when a "land-use regulation[ ] grant[s] discretion to [government] officials with regard to approval of the proposed development, [a landowner] possess[es] no property interest protected by the Fourteenth Amendment." *Gardner v. City of Baltimore,* 969 F.2d 63, 64 (4th Cir. 1992). If local regulations make it clear that a landowner is *entitled* to a permit upon application or upon the meeting of certain conditions, then the landowner has a property interest in that permit. *See Scott v. Greenville County,* 716 F.2d 1409, 1418 (4th Cir. 1983) ("Under South Carolina law settled well before he applied for the building permit, Scott enjoyed an entitlement to the issuance of a permit upon presentation of an application and plans showing a use expressly permitted under the then-current zoning ordinance."). On the other hand, "[a]ny significant discretion conferred upon the local agency [to issue or deny the permit] defeats the claim of a property interest." *Gardner,* 969 F.2d at 68. *See also Sylvia,* 48 F.3d at 826-27.

Here, it is clear that Henry is not entitled as a matter of right to a permit for his high-density townhouse project. Rather, the issuance of this permit is within the discretion of the Commission, guided by the process and factors enumerated in the zoning ordinance. Accordingly, Henry has no protected property interest in this permit, and his substantive due process claim has no merit. Henry also

presses a substantive due process claim with regard to his restaurant. However, Henry has yet to apply for or be denied a permit to rebuild his restaurant. Even if, as Henry alleges, Raco told him that he would not be able to obtain the restaurant permit, Henry must at least present the plan to the Commission and be turned down before he can claim that he was deprived of the opportunity to rebuild. Thus, aside from whether Henry even possesses a protected property interest in rebuilding the restaurant, he has not yet been deprived of any such interest because Jefferson County has not prohibited him from rebuilding. As noted above, Henry's substantive due process rights have not been violated until, at the very least, he has been deprived of his property. *Sylvia,* 48 F.3d at 827.

Henry also challenges the district court's grant of qualified immunity to the individual defendants. Normally, the question of qualified immunity arises only when some constitutional violation has occurred. Here, the court reached the question of qualified immunity because it disposed of the claims against the individual defendants two months before it determined on the merits that Henry's substantive due process right had not been violated. At this stage of the proceedings, because we agree that no due process violation has occurred, there is no liability either individually or officially and the question of immunity does not arise.

IV.

In sum, Henry's takings claim is not ripe because he has not sought just compensation from the State of West Virginia and been denied it. Thus, we vacate the district court's grant of summary judgment to the defendants on

Henry's takings claim and remand with instructions to dismiss the claim without prejudice. We affirm the district court's grant of summary judgment to the defendants on Henry's substantive due process claim.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Aubrey E. HENRY, Plaintiff,

v.

JEFFERSON COUNTY PLANNING COMM'N, et al., Defendants.

Civil Action Nos. 396-CV-40, 399-CV-25.

United States District Court,
N.D. West Virginia,
Martinsburg Division.

June 26, 2001.

John C. Yoder, Yoder Law Offices, Harpers Ferry, WV, for Plaintiff.

Michael D. Lorensen, Charles F. Printz, Jr., Bowles, Rice, McDavid, Graff & Love, Martinsburg, WV, for Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS RENEWED MOTION FOR SUMMARY JUDGMENT

BROADWATER, District Judge.

For the reasons set forth below, the Court **GRANTS** the defendants' renewed motion for summary judgment.

I. FACTS

A. *Background.*

Aubrey E. Henry (Henry) and Kenneth F. Lowe, Jr. (Lowe) applied for conditional use permits at different times and for properties zoned in different Zoning Districts. Henry's application was denied. However, Lowe's application was granted. Consequently, Henry filed suit.

The events in this civil action span over six years. They arise out of the following procedural framework for obtaining a conditional use permit, as set forth by the Zoning and Development Review Ordinance of Jefferson County, West Virginia (Ordinance), and procedures of appellate review, as set forth by the West Virginia Code.

1. *Procedure for Obtaining a Conditional Use Permit.*

The Ordinance sets forth five steps in reviewing an application for a conditional use permit: (1) the Planning and Zoning Staff evaluation of the Development Review System;[1] (2) the Compatibility Assessment Meeting;[2] (3) Public Hearings;[3] (4) Planning and Zoning Commission's decision on the application;[4] and (5) the Board of Zoning Appeal's decision.[5]

2. *Procedure of Appellate Review.*

The West Virginia Code provides for two levels of appellate review. First, an aggrieved party may file a petition for certiorari from the Board of Zoning Appeals (Board) to the Circuit Court of the County in which the property is located.[6] Second, an aggrieved party may file a

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[1] Ordinance § 7.3(b)(2).

[2] *Id.* § 7.3(b)(3).

[3] *Id.* § 7.3(b)(4).

[4] *Id.* § 7.3(b)(5).

[5] *Id.* § 7.3(b)(6).

[6] W. VA.CODE § 8-24-59 (1998).

petition for certiorari from the Circuit Court to the West Virginia Supreme Court of Appeals.[7]

B. *The Town Run Property and Maddex Court.*

Henry is the part owner of the Town Run Property located in Jefferson County, West Virginia.[8] For approximately twenty years, Henry operated a restaurant on the Town Run Property.[9] Under the Ordinance, the Town Run Property was located in a "Rural-Agricultural District",[10] and the restaurant operated as a non-conforming use.[11]

In addition to his ownership interest in the restaurant, Henry had an ownership interest in other properties, including the Maddex Court.[12] The Maddex Court is a forty-four unit apartment complex also located in Jefferson County, West Virginia.[13] This apartment complex is for tenants with low to moderate income levels.[14]

In February 1993, Henry's restaurant burned down.[15] Under the Ordinance, Henry was required to submit a

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[7] *Id.* § 8-24-65.

[8] Pl.'s Ex. A.

[9] Dep. of Henry, pp. 16-18.

[10] Ordinance § 5.7.

[11] *Id.* § 4.3. Henry operated the restaurant prior to the effective date of the Ordinance, *id.* § 1.0. The Ordinance, however, expressly permitted the continued use of the restaurant as a non-conforming use, *id.* § 4.3.

[12] Dep. of Henry, p. 18.

[13] *Id.* at p. 19.

[14] *Id.* at p. 33-36.

[15] *Id.* at p. 125.

formal proposal with the Planning and Zoning Commission (Commission) to rebuild his restaurant.[16] Henry did not submit such a proposal. Instead, he submitted a proposal to build seventy-six townhouses.[17]

C. *Henry's Application for a Conditional Use Permit.*

In order for Henry to build the townhouses, he had to either (1) petition the Jefferson County Commission to rezone the property on which he planned to build the townhouses[18] or (2) apply for a conditional use permit.[19] On January 25, 1994, Henry applied for a conditional use permit.[20]

1. *The First Step: Planning and Zoning Staff Evaluation of the Development Review System.*

The Development Review System is a method to "assess a particular sites [sic] development potential based on criteria which determine the agricultural longevity of the parcel in combination with the presence of and compatibility with public services adjacent and in close proximity to the site."[21] Under the Development Review System,[22] the Planning And Zoning Staff scored the site on

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[16] Ordinance § 4.3(c).

[17] Pl.'s Ex. A.

[18] W. VA.CODE § 8-24-46 (1998).

[19] Ordinance § 6.1.

[20] Pl.'s Ex. A.

[21] Ordinance § 6.1.

[22] *Id.* art. VI.

which Henry planned to build the townhouses a 39.04.[23] Consequently, his application proceeded to the next stage: the Compatibility Assessment Meeting.[24]

2. *The Second Step: The Compatibility Assessment Meeting.*

The Compatibility Assessment Meeting "allows the adjacent and confronting property owners and all other interested parties the opportunity to hear the developer's presentation and plan."[25] On March 23, 1994, the Commission conducted the Compatibility Assessment Meeting.[26] Henry attended this meeting. At this meeting, the community expressed opposition to Henry's plan to build townhouses. Specifically, the community members raised twenty-five concerns regarding the incompatibility of these townhouses to their surroundings. At the close of the meeting, Henry agreed to resolve five of these compatibility issues. Therefore, sixteen compatibility issues remained unresolved. These sixteen conditions were:

1. Erect an 8 foot fence along the Men's Club property line (the park);

2. Provide stormwater management for the 25 year storm;

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[23] Pl.'s Ex. B, p. 8.

[24] Ordinance § 6.2.

[25] *Id.* § 7.6.

[26] Pl.'s Ex. C, p. 1.

3. Provide the amount of volume and depth increases in Town Run accounted to stormwater management and effluent discharge;

4. Notify Department of Environmental Protection the result of number three as a part of their waste load allocation;

5. Provide yearly monetary donation to Morgan Grove Park;

6. Provide a note on plat and disclosure to buyers that identifies the more intense uses associated with the park;

7. Reduce the density to no more than 1 unit per acre;

8. Do a cost analysis and feasibility study on hooking up to Shepherdstown sewer;

9. Provide a 100 foot building setback along southern property line;

10. Notify the West Virginia Department of Culture and History of this development and allow them to consider its impact;

11. Do a scientific study on the effect of an inoperable package treatment plant on the Marsh and Town Run;

12. Do a traffic study to be submitted and approved by the Department of Transportation;

13. Provide an unscalable fence between the Marsh and development;

14. Provide an area for resident animals to defecate;

15. Provide school impact fees in the amount of $1500.00 per unit prior to house construction; and

16. Conduct a bio-assessment study on the impact of the approved waste load allocation on the marsh.[27]

3. *The Third Step: Public Hearings.*

The Public Hearing is a forum "to hear the staff's report of the issues and concerns raised at the Compatibility Meeting."[28] Because these sixteen compatibility issues remained unresolved at the conclusion of the March 23, 1994 Compatibility Assessment Meeting, the Commission held a Public Hearing on April 26, 1994. At the conclusion of this Public Hearing, the compatibility issues still remained unresolved. The Commission, therefore, continued the hearing until May 24, 1994.[29]

At this second Public Hearing, the public continued to address their concerns regarding the incompatibility of these townhouses to their surroundings.[30] The Ordinance provided Henry with a right to rebut the public's concerns.[31] Henry, however, did not offer any response.[32]

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[27] *Id.* at pp. 1-2.

[28] Ordinance § 7.6(e).

[29] Pl.'s Ex. D, p. 3.

[30] Pl.'s Ex. E, pp. 1-2.

[31] Ordinance § 7.7(c).

[32] Pl.'s Ex. E, p. 2.

4. *The Fourth Step: The Planning and Zoning Commission's Decision on the Application.*

At the conclusion of the May 24, 1994 Public Hearing, the Commission, by unanimous vote, denied Henry's application for a conditional use permit. In page two of the Commission's minutes, the Commission stated the following as grounds for its decision to deny Henry's application: "density, the projects [sic] danger to the Town Run and Morgan Grove Park and the incompatibility of the project with the neighborhood."[33]

5. *The Fifth Step: The Board of Zoning Appeal's Decision.*

The Board, among other duties,[34] "[h]ear[s] and decide[s] appeals regarding the Planning and Zoning Commission's issuance or denial of a Conditional Use Permit."[35] Henry appealed the Commission's decision to the Board.[36] On August 18, 1994, the Board of [sic] upheld the Commission. By letter dated August 26, 1994, the Board determined that the basis of the Commission's "decision was the projects [sic] density; its effects on the Town Run Marsh and Morgan Grove Park; and, its incompatibility with the neighborhood."[37]

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[33] *Id.*

[34] Ordinance § 7.8(b)(2)-(3).

[35] *Id.* § 7.8(b)(1).

[36] Defs.' Ex. 8.

[37] Pl.'s Ex. E.

D. *Henry's Appeals to the West Virginia State Courts.*

1. *The First Appeal.*

Henry filed a petition for certiorari to the Circuit Court of Jefferson County.[38] By Order entered January 16, 1996, the Circuit Court affirmed the Board's decision.[39] In response, Henry filed an appeal to the West Virginia Supreme Court of Appeals.

By Opinion decided November 21, 1997, the West Virginia Supreme Court of Appeals determined that the Board's decision was not supported by adequate findings of fact. Consequently, the West Virginia Supreme Court of Appeals remanded the matter to the Board.[40]

Following remand, the Board issued a seven page decision and order entered February 19, 1998. This decision and order set forth findings of fact and conclusions of law in support of the Board's decision to uphold the Commission's denial of Henry's application for a conditional use permit.[41]

2. *The Second Appeal.*

Henry filed a second petition for certiorari dated April 16, 1998 with the Circuit Court.[42] However, on August 27,

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[38] W. VA. CODE § 8-24059 (1988); Ordinance § 8.3(b).

[39] Defs.' Renewed Mot. Summ. J., Ex. J.

[40] *Henry v. Jefferson County Planning Comm'n*, 201 W.Va. 289, 496 S.E.2d 239, 242 (1997).

[41] Defs.' Ex. 10.

[42] Defs.' Ex. 11.

1999, the Circuit Court affirmed the Board.[43] In response, Henry filed a second appeal to the West Virginia Supreme Court of Appeals. By Order entered March 8, 2000, the West Virginia Supreme Court of Appeals denied Henry's appeal.[44]

E. *The Lowe Project and this Federal Lawsuit.*

Two pertinent events occurred while Henry's first appeal was pending before the West Virginia Supreme Court of Appeals. First, Lowe applied for a conditional use permit for the development of the Eastern Management Development Center (Lowe Project).[45] In contrast to the property on which Henry planned to build the seventy-six townhouses, which the Ordinance zoned as a "Rural-Agricultural District",[46] the Ordinance zoned the property on which Lowe planned to develop the Lowe Project as a "Residential-Growth District."[47]

Following the Planning and Zoning Staff evaluation of the Development Review System,[48] the Commission held the Compatibility Assessment Meeting on July 31, 1996.[49] At the meeting, in contrast to Henry's Compatibility Assessment Meeting of March 23, 1994, Lowe agreed to resolve all of the public's concerns. Therefore, unlike

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[43] Defs.' Ex. 13.

[44] Defs.' Ex. 14.

[45] Pl.'s Ex. I.

[46] Ordinance § 5.7.

[47] *Id.* § 5.4; Pl.'s Ex. K.

[48] Ordinance § 7.3(b)(2).

[49] *Id.* § 7.3(b)(3); Pl.'s Ex. J.

Henry, there were no unresolved issues at the conclusion of the Compatibility Assessment Meeting. Consequently, the Commission did not schedule a Public Hearing[50] and, instead, scheduled the matter for a decision.[51] On August 13, 1996, the Commission granted Lowe's application for a conditional use permit for the Lowe Project.[52] This would become known as the Clarion Hotel and Conference Center in Shepherdstown, West Virginia.[53]

Second, Henry filed a civil action in this Court on May 24, 1996 (*Henry I*)[54] suing the Commission[55] as well as its individual members[56] and the Director of the Commission.[57] Henry argued that the denial of his conditional use permit and the foreclosure of the option of rebuilding his burned down restaurant amounted to an unconstitutional taking[58] and a violation of his rights under the due process clause.[59] Henry also asserted that the Ordinance was unconstitutional.[60]

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[50] Ordinance § 7.3(b)(4).

[51] *Id.* § 7.6(f).

[52] Pl.'s Ex. K.

[53] Pl.'s Ex. J.

[54] *Henry v. Jefferson County Planning Comm'n*, 3:1996cv40.

[55] Compl. ¶ 6.

[56] *Id.* ¶¶ 7-14.

[57] *Id.* ¶ 16.

[58] *Id.* ¶¶ 37-42.

[59] *Id.* ¶¶ 43-47.

[60] *Id.* ¶¶ 47-50.

II. PROCEDURAL BACKGROUND

A. *Amended Complaint.*

By Orders entered November 22, 1996[61] and June 20, 1997,[62] the Court stayed *Henry I* pending Henry's first appeal to the West Virginia Supreme Court of Appeals. After the West Virginia Supreme Court of Appeals' Opinion decided November 21, 1997, this Court held a status conference on January 6, 1998.[63] During this status conference, the Court granted Henry's motion to amend the complaint.[64]

On January 23, 1998, Henry filed his amended complaint[65] based upon, *inter alia,* the Commission's decision to grant Lowe's application for a conditional use permit for the Lowe Project. In his amended complaint, Henry sued the following defendants: (1) Jefferson County,[66] (2) the Board,[67] (3) the Commission,[68] (4) the individual members of the Commission,[69] and (5) the Director of the Commission.[70] As well, Henry asserted five causes of action:

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[61] Doc. # 13.

[62] Doc. # 14.

[63] Doc. # 15.

[64] Doc. # 16.

[65] Doc. # 17.

[66] Am. Compl. ¶ 6.

[67] *Id.* ¶ 7.

[68] *Id.* ¶ 8.

[69] *Id.* ¶¶ 9-16.

[70] *Id.* ¶ 17.

(1) unconstitutional taking,[71] (2) due process,[72] (3) equal protection (rational basis),[73] (4) equal protection (suspect classification),[74] and (5) unconstitutionality of the Ordinance.[75]

B. *Order on Motion to Dismiss.*

By Order entered September 24, 1998, the Court dismissed all of Henry's causes of action except his fifth cause of action challenging the constitutionality of the Ordinance.[76]

C. *Henry II.*

On March 23, 1999, Henry filed a second civil action (*Henry II*) in this Court.[77] This civil action was the same in all material respects as *Henry I.* However, in *Henry II,* Henry included the State of West Virginia as a defendant.[78] As well, in *Henry II,* the Lowe Project was complete and in operation as the Clarion Hotel and Conference Center in Shepherdstown, West Virginia.[79] Furthermore,

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[71] *Id.* ¶¶ 58-63.

[72] *Id.* ¶¶ 64-68.

[73] *Id.* ¶¶ 69-82.

[74] *Id.* ¶¶ 83-95.

[75] *Id.* ¶¶ 96-104.

[76] Doc. # 31. The parties did not address the implicit overruling of *Pomponio v. Fauquier County Bd. of Supervisors,* 21 F.3d 1319 (4th Cir.1994), at that time.

[77] *Henry v. West Virginia,* 3:1999cv25.

[78] Compl. ¶ 6.

[79] *Id.* ¶ 49.

Henry brought two additional causes of action challenging the constitutionality of West Virginia Code § 8-24-60.[80]

D. *Order on Motion for Summary Judgment.*

By Order entered July 21, 1999, the Court Granted defendants' motion for summary judgment with respect to the fifth claim in *Henry I,* challenging the constitutionality of the Ordinance, and dismissed the matter from the active docket of the Court.[81]

E. *Fourth Circuit Court of Appeals.*

Henry filed an appeal with the Fourth Circuit Court of Appeals.[82] By Opinion decided June 9, 2000, the Fourth Circuit vacated this Court's September 24, 1998 Order on the defendants' motion to dismiss and upheld this Court's July 21, 1999 Order on the defendants' motion for summary judgment in *Henry I.*[83] Accordingly, the Fourth Circuit remanded the matter to this Court to proceed upon Henry's first four causes of action.

F. *Dismissal and Consolidation Following Remand.*

Following remand, the Court held a status conference on September 1, 2000.[84] During the status conference, the

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[80] *Id.* ¶¶ 63-76.

[81] Doc. # 44.

[82] Doc. # 46.

[83] *Henry v. Jefferson County Planning Comm'n,* No. 99-2122, 2000 WL 742188 (4th Cir. Jun 9, 2000).

[84] Doc. # 52.

Court, without objection, dismissed Henry's claims challenging the constitutionality of West Virginia Code § 8-24-60 in *Henry II*. Accordingly, the Court dismissed the State of West Virginia as a defendant. Furthermore, the Court consolidated both *Henry I* and *Henry II*.[85]

G. *Remaining Causes of Action.*

Therefore, the following claims remain before the Court for consideration: (1) unconstitutional taking, (2) due process, (3) equal protection (rational basis), and (4) equal protection (suspect classification). Furthermore, the following defendants remain in this civil action: (1) Jefferson County, (2) the Commission, (3) the Board, (4) the individual members of the Commission, and (5) the Director of the Commission.

H. *Renewed Motions for Summary Judgment.*

On January 29, 2001, the defendants filed their renewed motions for summary judgment.[86] Henry filed his response on February 15, 2001[87] and on February 27, 2001, defendants filed their reply.[88]

On March 5, 2001, the parties appeared for a motions hearing.[89] The Court took the issues under advisement.[90]

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[85] Doc. # 53.

[86] Docs. ## 86 & 88.

[87] Doc. # 92.

[88] Doc. # 101.

[89] Doc. # 77.

[90] Doc. # 105.

Thereafter, by Order entered April 20, 2001,[91] the Court granted the individual defendants' motion for summary judgment finding that they were entitled to qualified immunity for their acts and/or omissions under *Harlow v. Fitzgerald.*[92] Therefore, the following defendants now remain in this civil action: (1) Jefferson County, (2) the Commission, and (3) the Board.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[93] This requires the Court to conduct "the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[94]

The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts."[95] "If the evidence is merely

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[91] Doc. # 134.

[92] 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

[93] Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

[94] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[95] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

colorable, or is not significantly probative, summary judgment may be granted."[96]

IV. DISCUSSION OF LAW AND ANALYSIS

A. *First Cause of Action: Takings Claim.*

1. *Plaintiff's Argument.*

Henry alleges that the defendants violated his rights under the Takings Clause of the Constitution by first, foreclosing his option of rebuilding his restaurant after it burned down and second, by denying his application for a conditional use permit.

2. *Discussion of Law.*

The Takings Clause of the United States Constitution, applicable to the States via the Fourteenth Amendment,[97] prohibits the taking of private property without just compensation.[98] "The aim of the Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' "[99]

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[96] *Anderson,* 477 U.S. at 249, 106 S.Ct. 2505 (citations omitted).

[97] *Chicago, B & Q.R. Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

[98] U.S. CONST. amend. V.

[99] *Eastern Enters. v. Apfel,* 524 U.S. 498, 522, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

In *Lucas v. South Carolina Coastal Council,*[100] the United States Supreme Court set forth two discrete categories of state action that violate the Takings Clause.[101] The first category is state action that physically invades private property.[102] The second category is state action that denies all economically beneficial use of property.[103]

Additionally, the Supreme Court provided two factors to determine whether state action violates the Takings Clause. The first factor is the extent to which state action interferes with reasonable investment-backed expectations. [104] The second factor is whether the regulation advances a legitimate state interest.[105]

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[100] 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[101] *Id.* at 1015, 112 S.Ct. 2886 ("We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint.").

[102] *Id.* ("The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property.").

[103] *Id.* ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.").

[104] *Id.* at 1019, n. 8, 112 S.Ct. 2886 ("[A]s we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally.") (quoting *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)).

[105] *Id.* at 1023-24, 112 S.Ct. 2886; *see also Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.,* 65 F.3d 1113, 1123 (4th Cir.1995). *See generally* 31 AM.JUR.3D *Proof of Facts* § 563 (1995 & Supp.2000).

3. *Analysis.*

Henry has not provided any evidence that Raco, the Director of the Commission, prohibited Henry from rebuilding his restaurant. On the contrary, in Raco's deposition dated November 27, 2000, Raco informed Henry that, because the Ordinance classified the restaurant as a nonconforming use, Henry could not rebuild the restaurant as-of-right.[106] Furthermore, in his response to discovery requests, Henry stated that "Raco told plaintiff that the rebuilt restaurant . . . would most likely not be approved, and that it would be easier to get approval of the townhouses than the restaurant".[107] Consequently, Raco simply advised Henry of the Ordinance's effect as it applied to

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[106] A. Mr. Henry was taking [sic] about the restaurant that burned down that occupied that occupied [sic] that site.

. . . .

Q. Did he inquire of you as to whether he could rebuild the restaurant? Do you recall?

A. Yes.

Q. Did you respond to him in any way in response to that inquiry?

A. Yes.

Q. What did you tell him?

A. I told him that it was my interpretation of the ordinance that he could not rebuild it, by right, since it was a non-conforming use, but he could attempt to ask the Zoning Board of Appeals to rebuild it. I even hold [sic] him four examples of non-conforming uses that were burned down that the Zoning Board did grant the right to rebuild, but in my opinion, he had to go to the Zoning Board, not to me.

Dep. of Raco, pp. 19-20.

[107] Pl.'s Resp. to First Set of Interrogs. and Req. for Production of Docs. to the Pl., pp. 2-3.

Henry. Raco did not foreclose the option of rebuilding the restaurant.

Furthermore, there is no dispute that the defendants did not physically invade Henry's property.[108] As well, the defendants' actions, in allegedly foreclosing the option of rebuilding the restaurant and denying Henry's application for a conditional use permit, did not deny Henry of all economical use of the Town Run Property.[109] On the contrary, the Ordinance expressly permits Henry to operate a farm,[110] single family dwellings, mobile homes,[111] markets for the sale of farm products[112] and other uses.[113] Therefore, the defendants' actions did not deprive Henry all economical use of the Town Run Property.

Additionally, Henry cannot argue that the alleged foreclosure of his option of rebuilding his restaurant and the denial of his application or a conditional use permit interfered with his reasonable investment-backed expectations.[114] As previously mentioned, Henry has not provided any evidence that Raco foreclosed his option of rebuilding his restaurant.[115] Furthermore, Henry cannot reasonably expect that the Commission would automatically grant his

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[108] *See supra* note 102.

[109] *See supra* note 103.

[110] Ordinance § 5.7(a)(1).

[111] *Id.* § 5.7(a)(3).

[112] *Id.* § 5.7(a)(11).

[113] *Id.* § 5.7(a)(2), (4)-(10), (12)-(16).

[114] *See supra* note 104.

[115] *See supra* notes 106-07 and accompanying text.

application for a conditional use permit.[116] Therefore, the Henry's Takings claim focuses on whether the sixteen conditions advance a legitimate state interest.[117]

The sixteen conditions all advance legitimate state interests. The stated purposes of the Ordinance are to:

(a) Protect and encourage the health, safety and general welfare of the present and future population of Jefferson County.

(b) Help guide the future growth and development of Jefferson County in accordance with the adopted Comprehensive Plan.

(c) Encourage growth and development in areas where sewer, water, schools, and other public facilities are or will soon be available in order to provide services in the most cost effective manner.

(d) Insure that growth and development are both economically and environmentally sound.

(e) Encourage the maintenance of an agricultural base in the County at a level sufficient to insure the continued viability of farming.

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[116] *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) ("A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'") (quoting *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980)); *see also infra* notes 175-96.

[117] *See supra* note 105.

(f) Encourage and support commercial, industrial and agricultural activities while maintaining land use, order and compatibility.

(g) Encourage an improved appearance of Jefferson County with relationship to the use and development of land and structures.

(h) Encourage the conservation of natural resources.

(i) Provide a guide for public action in the orderly and efficient provision of public facilities and services.

(j) Provide a guide for private enterprise in developing and building a strong economic community.

(k) Encourage historic preservation.[118]

Conditions 1,[119] 5[120] and 9[121] advance the stated purpose of promoting the general welfare.[122] Conditions 2,[123] 3,[124] 4,[125]

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[118] Ordinance § 1.1.

[119] Erect an 8 foot fence along the Men's Club property line (the park).

[120] Provide yearly monetary donation to Morgan Grove Park.

[121] Provide a 100 foot building setback along southern property line.

[122] Ordinance 1.1(a).

[123] Provide stormwater management for the 25 year storm.

[124] Provide the amount of volume and depth increases in Town Run accounted to stormwater management and effluent discharge.

[125] Notify Department of Environmental Protection the result of number three as a part of their waste load allocation.

and 13[126] advance the Ordinance's stated purpose of ensuring that development remains environmentally sound.[127] Conditions 6,[128] 7[129] and 12[130] advance the Ordinance's stated purpose of promoting the County's agricultural base.[131] Conditions 8,[132] 11,[133] 15,[134] and 16[135] advance the Ordinance's stated purpose of encouraging growth in areas where public facilities would be utilized in the most cost effective manner.[136] Condition 10[137] advances the Ordinance's stated purpose of encouraging historic preservation.[138] Condition 14[139] advances the Ordinance's stated purpose of promoting health.[140] Finally, the Ordinance's stated purposes advance

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[126] Provide an unscalable fence between the Marsh and development.

[127] Ordinance § 1.1(d).

[128] Provide a note on plat and disclosure to buyers that identifies the more intense uses associated with the park.

[129] Reduce the density to no more than 1 unit per acre.

[130] Do a traffic study to be submitted and approved by the Department of Transportation.

[131] Ordinance § 1.1(e).

[132] Do a cost analysis and feasibility study on hooking up to Shepherdstown sewer.

[133] Do a scientific study on the effect of an inoperable package treatment plant on the Marsh and Town Run.

[134] Provide school impact fees in the amount of $1500.00 per unit prior to house construction.

[135] Conduct a bio-assessment study on the impact of the approved waste load allocation on the marsh.

[136] Ordinance § 1.1(c).

[137] Notify the West Virginia Department of Culture and History of this development and allow them to consider its impact.

[138] Ordinance § 1.1(k).

[139] Provide an area for resident animals to defecate.

[140] Ordinance § 1.1(a).

the objectives of planing [sic] and zoning as set forth in the West Virginia Code.[141] Consequently, all sixteen conditions advance the different legitimate stated purposes of the Ordinance.

4. *Conclusion.*

Therefore, the Court **DISMISSES** plaintiff's Takings claim.[142]

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[141] W. VA.CODE §§ 8-24-1 & 8-24-39 (1998).

[142] Henry also argues that the imposition of the sixteen conditions violated the Takings Clause because there was no rough proportionality as between these conditions and the impact of the townhouses. This argument is without merit.

In *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), the Supreme Court addressed the degree of relationship that must exist as between the condition upon a development permit, in the form of the developer dedicating land to the city, and the impact that development may have upon the community, *id.* at 388, 114 S.Ct. 2309. The Supreme Court addressed the different approaches adopted by various jurisdictions, *id.* at 388-91, 114 S.Ct. 2309. Ultimately, the Supreme Court concluded that the proper test is the "rough proportionality" test, *id.* at 391, 114 S.Ct. 2309. The Supreme Court concluded that this test does not require "precise mathematical calculation[s]." *id.* at 391, 114 S.Ct. 2309. On the contrary, the Supreme Court concluded that this test requires an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *id.* (footnote omitted).

Subsequently, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999), the Supreme Court expressly limited the *Dolan* "rough proportionality" test to the limited context of exactions, *id.* at 702, 119 S.Ct. 1624 ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use."). Therefore,

(Continued on following page)

B. *Second Cause of Action: Substantive Due Process.*[143]

1. *Plaintiff's Argument.*

Henry argues that the defendants violated his rights under the Due Process Clause of the Fifth and Fourteenth Amendments by denying his application for a conditional use permit. Specifically, Henry alleges that the defendants acted arbitrarily by (1) imposing the sixteen conditions that did not have any legitimate basis, (2) improperly basing their decision in denying Henry's application for a conditional use permit upon community opposition, and (3) requiring Henry to rebut the public's opposition to Henry's plan to build townhouses.[144]

2. *Discussion of Law.*

In order to prevail on a substantive due process claim, a plaintiff must establish the following elements: (1) that

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the Supreme Court did not apply the "rough proportionality" test to the denial of a development proposal, *id*. at 703, 119 S.Ct. 1624.

In this case, none of the sixteen conditions require Henry to dedicate portions of the Town Run Property for public use. Therefore, Henry's arguments concerning the alleged lack of rough proportionality are without merit.

[143] Henry's complaint in *Henry I* included both a substantive, Compl. ¶¶ 45-46, and procedural due process claim, *id.* ¶ 47. However, in the Amended Complaint in *Henry I*, Am. Compl. ¶¶ 66-68, and the Complaint in *Henry II*, Compl. ¶¶ 85-87, Henry withdrew his procedural due process claim and proceeded only on a substantive due process claim.

[144] Henry also argues that Raco denied Henry's due process rights by advising Henry not to rebuild his restaurant. However, as previously mentioned, Henry has not provided evidence in support of his allegation that Raco made these statements, *see supra* notes 106-07 and accompanying text.

the plaintiff has a property interest, (2) that the defendants deprived the plaintiff of his property interest, and (3) that the defendants' actions were so far beyond the outer limits of legitimate government action that no process could cure the defendants' actions.[145] "In more recent decisions, the Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning."[146] Importantly, state law and not the Fourteenth Amendment creates a property interest.[147]

From the Court's survey of relevant Fourth Circuit case law, there are three different situations where a developer may file a substantive due process challenge to a decision denying the developer's plan to develop property. In the first situation, state law expressly provides that the developer does have a protected property interest in his development plan. If this is established, the Fourth Circuit proceeds to the second and third prongs of the substantive due process analysis, set forth above, and reviews whether

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[145] *Sylvia Dev. Corp. v. Calvert County,* 48 F.3d 810, 827 (4th Cir.1995).

[146] *Id.* at 827-28 (citing *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974)).

[147] *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent sources [sic] such as state law").

the defendants' actions violated the developer's protected property interest.[148]

In the second situation, state law expressly provides that the developer does not have a protected property interest in his development plan. Therefore, the Fourth Circuit dismisses the substantive due process challenge under these circumstances.[149]

In the third situation, it is less certain whether state law provides the developer a protected property interest in his development plan. In this case, the Fourth Circuit requires that the developer "must have more than an abstract need or desire for [the requisite permission to proceed with his development plan]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[150] A person has a legitimate claim of entitlement to a development plan if the individuals reviewing the plan "lack[ ] *all* discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the [individuals reviewing the plan] defeats the claim of a property interest."[151] Accordingly, the Fourth Circuit focuses on whether the

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[148] *See infra* notes 153-57.

[149] *See infra* notes 158-59.

[150] *Board of Regents*, 408 U.S. at 577, 92 S.Ct. 2701; *see also Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68-69 (4th Cir.1992) (stating that the *Roth* "claim of entitlement" standard applies to substantive due process challenges to land-use decisions). *But see* Kenneth B. Bley & Tina R. Axelrad, *The Search for Constitutionally Protected "Property" in Land-Use Law*, 29 URB. LAW. 251, 269-75 (1997) (criticizing the entitlement analysis to substantive due process challenges to land use restrictions).

[151] *Gardner*, 969 F.2d at 68 (emphasis in original).

state law provides the defendants significant discretion in determining whether to grant or deny the developer's plan.[152]

i. The First Situation.

In *Scott v. Greenville County,*[153] the Fourth Circuit addressed the first situation: where state law expressly provided the developer a property interest in his development plan. The Fourth Circuit concluded that the developer "held a cognizable property interest, rooted in state law, to which federal due process protection extended."[154] The developer had complied with all of the requirements under the zoning ordinance for obtaining a building permit.[155] As well, the South Carolina Courts ordered that the developer's permit be immediately issued.[156] Therefore,

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[152] *See infra* notes 160-74.

[153] 716 F.2d 1409 (4th Cir.1983).

[154] *Id.* 1418-19 (footnote omitted).

[155] *Id.* at 1418 ("Scott's plans . . . fully complied with the requirements of the zoning ordinance in effect as of the date on which he formally applied.").

[156] *Id.* at 1413 (stating that the trial court ordered the immediate issuance of the permit and the South Carolina Supreme Court upheld this order on appeal).

Similarly, in *Marks v. City of Chesapeake,* 883 F.2d 308 (4th Cir.1989), a developer secured the necessary changes in the zoning ordinance to proceed with his planned development, *id.* at 309. Consequently, in reviewing a substantive due process challenge to the denial of his application for a conditional use permit, the Fourth Circuit proceeded with the second and third prongs of the substantive due process analysis: whether the defendants deprived the plaintiff of his property interest, and whether the defendants actions were so far beyond the outer limits of legitimate government action that no process could cure the defendants' actions, *id.* at 311-12. Therefore, the Fourth Circuit

(Continued on following page)

the Fourth Circuit proceeded to analyze the defendant's actions under the second and third prongs of the substantive due process analysis. [157]

ii. The Second Situation.

In contrast, in *Greenspring Racquet Club v. Baltimore County*,[158] the Fourth Circuit addressed the opposite situation: where the developer does not have a protectable property interest in his development plan. The Fourth Circuit concluded that the developer did not have a protectable property interest in his development plan because a zoning ordinance specifically precluded the developer from proceeding with his development plan. Accordingly, the Fourth Circuit dismissed the developer's substantive due process claim.[159]

iii. The Third Situation.

Finally, in *Gardner v. Baltimore Mayor & City Council*,[160] *Biser v. Town of Bel Air*,[161] and *Sylvia Dev. Corp. v.*

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implicitly concluded that the zoning changes provided the developer a protected property interest to which substantive due process protections attached.

[157] *Scott*, 716 F.2d at 1419 ("Having determined that Scott correctly claims a constitutionally protected property interest, we must now consider whether its deprivation was attended by that process which was Scott's due.") (citations omitted).

[158] Nos. 99-2444, 00-1012, 2000 WL 1624496 (4th Cir. Oct.31, 2000).

[159] *Id.* at *7.

[160] 969 F.2d 63 (4th Cir.1992).

[161] 991 F.2d 100 (4th Cir.1993).

Calvert County,[162] the Fourth Circuit addressed the third situation and focused on whether state law provided significant discretion in determining whether to grant or deny a developer's plan. In *Gardner*, the Fourth Circuit considered three factors significant in its conclusion that the planning commission's role was "more than merely ministerial."[163] First, various state agencies outside the planning commission provided input to the planning commission.[164] Second, the regulations did not provide substantive criteria for the planning commission to evaluate the sufficiency of development plans.[165] The Fourth Circuit concluded that "[i]t is evident from the variety of agencies from which evaluations are sought that the Planning Commission may find a [development plan] inadequate on any number of grounds."[166] Third, the regulations provided that the planning commission will not approve the final development plan until the city deemed acceptable the dedications of land to the city.[167]

In *Biser*, the zoning ordinance provided the board of appeals a flexible standard, and therefore significant discretion, to determine whether to grant a special exception.[168] Specifically, under the ordinance, the board "had to determine whether granting the exception 'would adversely affect the public health, safety, security, morals or

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[162] 48 F.3d 810 (4th Cir.1995).

[163] 969 F.2d at 69.

[164] *Id.* at 70.

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] 991 F.2d at 104.

general welfare, or would result in dangerous traffic conditions or would jeopardize the lives or property of people living in the neighborhood.'"[169] Furthermore, the zoning ordinance set forth eighteen separate factors for the board to consider in evaluating an application for a special exception. Consequently, the Fourth Circuit concluded that the board had significant discretion.[170]

In *Sylvia Dev. Corp.*, the Fourth Circuit reviewed the county zoning ordinance and concluded that the developer did not have a property interest in the approval of a special zoning designation.[171] Although the county board of commissioners did not have discretion in creating the special zoning designations in the first place, the zoning ordinance provided the board discretion to determine both the location and whether to approve the special zoning designation.[172] Furthermore, the criteria set forth by the zoning ordinance for land to qualify for the special zoning designation were mere preconditions that must be met in order for such land to be considered for the special zoning designation.[173] As well, the Fourth Circuit considered significant that the zoning ordinance provided for numerous reviews and numerous interpretive judgments that must be met for land to qualify for the special zoning designation.[174]

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[169] *Id.* (quoting the zoning ordinance).

[170] *Id.* ("It is difficult to imagine a more flexible standard.").

[171] 48 F.3d at 826.

[172] *Id.*

[173] *Id.*

[174] *Id.*

(Continued on following page)

3. *Analysis.*

This case before this Court is distinguishable from *Scott v. Greenville County.*[175] In contrast to the developer in *Scott,* Henry did not complete all of the requirements for obtaining a conditional use permit;[176] the Commission denied his application. In contrast to the developer in *Scott,* Henry did not obtain any court order requiring the Commission to grant his application.[177] On the contrary, by Opinion decided November 21, 1997, the West Virginia Supreme Court of Appeals remanded the matter to the Board to issue findings of fact and conclusions of law.[178]

This case is also distinguishable from *Greenspring Racquet Club v. Baltimore County.*[179] In contrast to the ordinance in *Greenspring,* the Ordinance did not specifically prohibit Henry from proceeding with his application for a conditional use permit.[180] Here, the Ordinance,

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Importantly, the Fourth Circuit held that the county planning commission's favorable recommendation for the creation of the special zoning designation did not create an entitlement to the special zoning designation. The zoning ordinance only required the board to consider but not follow the recommendation, *id.* at 826-27. Furthermore, the Fourth Circuit held that a court order requiring the board to approve the application did not create an entitlement because that court order did "not mean that the applicant had a preexisting legal right to" the special zoning designation, *id.* at 827 (citing *Biser,* 991 F.2d at 105).

[175] 716 F.2d 1409 (4th Cir.1983).

[176] *See supra* note 155.

[177] *See supra* note 156.

[178] *Henry v. Jefferson County Planning Comm'n,* 201 W.Va. 289, 496 S.E.2d 239, 242 (1997).

[179] Nos. 9902244, 00-1012, 2000 WL 1624496 (4th Cir. Oct. 31, 2000)

[180] *See supra* note 159.

through the five step procedure for obtaining a conditional use permit, expressly contemplated the development of projects such as Henry's plan to build townhouses.[181]

Instead, this case is more akin to the third situation where it is less certain whether state law provides the developer a protectable property interest in his development plan.[182] Therefore, the issue in this matter is whether the Ordinance provides the defendants "significant discretion" in deciding whether to grant or deny Henry's application for a conditional use permit.

From a review of the factors set forth in the prior Fourth Circuit cases, the Court finds that the defendants have significant discretion in reviewing applications for conditional use permits. The Ordinance is similar to the ordinance in *Gardner v. Baltimore Mayor & City Council*[183] in two key respects. First, the Commission, like the planning commission in *Gardner,* considered input from individuals outside the Commission[184] during the Compatibility Assessment Meeting[185] and Public Hearings.[186] Second, the Ordinance does not provide the Commission substantive criteria to review the input from these individuals.[187] The Ordinance simply provides that "[t]he

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[181] Ordinance § 7.3(b)(2)-(6).

[182] *See supra* notes 160-74.

[183] 969 F.2d 63 (4th Cir.1992).

[184] *See supra* note 164.

[185] *Id.* § 7.6(a).

[186] *Id.* § 7.7(c).

[187] *See supra* note 165.

Planning and Zoning Commission shall issue, issue with conditions, or deny the conditional use permit."[188]

For this reason, the Ordinance, similar to the ordinance in *Sylvia Dev. Corp. v. Calvert County*[189] provides the Commission a flexible standard to review applications for conditional use permits.[190] As well, similar to the ordinance in *Sylvia,* the Ordinance subjects applications for conditional use permits to numerous levels of review.[191] The Ordinance requires that applications for conditional use permits must proceed within the five step procedural framework,[192] and the West Virginia Code provides for two further levels of appellate review by West Virginia Courts.[193]

Therefore, under the various factors set forth by the Fourth Circuit, the Ordinance provides the Commission and Board substantial discretion.[194] Thus, Henry's interest in obtaining a conditional use permit is, at best, a unilateral expectation and not a protected property interest.[195] Accordingly, without a property interest in the conditional

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[188] *Id.* § 7.6(g).

[189] 48 F.3d 810 (4th Cir.1995).

[190] *See supra* note 168.

[191] *See supra* note 174.

[192] Ordinance § 7.3(b)(2)-(6).

[193] W. VA.CODE §§ 8-24-59 & 8-24-65 (1998).

[194] In fact, in his opposition to the defendants' renewed motion for summary judgment, Henry explicitly recognized that the Commission has discretion in reviewing applications for conditional use permits, Pl.'s Opp'n p. 30.

[195] *See, e.g., Clift v. Ware,* No. 98-1251, 1998 WL 883490 at * 2 (4th Cir. Dec.18, 1998) (discretion forecloses claim of entitlement); *Pathways Psychosocial v. Town of Leonardtown,* 133 F. Supp 2d 772, 792 (D.Md.2001) (same).

use permit, plaintiff's substantive due process argument necessarily fails.[196]

However, even if Henry could establish a protectable property interest in his application for a conditional use permit, he cannot establish that the defendants actions were so far beyond the outer limits of legitimate state action that no person could cure the defendants' actions.[197] First, as previously mentioned, the sixteen conditions all advance legitimate state interests.[198] Second, while it is true that community opposition based upon unfounded prejudice and fears is not a proper grounds to deny Henry's application for a conditional use permit,[199] Henry has not provided evidence that the defendants acted upon the public's unfounded prejudices and fears, if any. Third, there is no evidence that Henry was required to rebut the public's opposition to his plan to build townhouses. Although the Ordinance provides Henry a right to rebut the public's concerns at the Public Hearing,[200] Henry did not exercise his right.[201] Furthermore, there is no evidence that

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[196] *See, e.g., Smith-Berch, Inc. v. Baltimore County,* 68 F. Supp 2d 602, 628 (D.Md.1999) ("Plaintiff nowhere asserts an entitlement to the zoning permit. Consequently, [plaintiff's substantive due process argument] must fail.").

[197] *See supra* note 145.

[198] *See supra* notes 119-41.

[199] *See Marks v. City of Chesapeake,* 883 F.2d 308, 312 (4th Cir.1989) ("We therefore think it clear that if, as alleged, the City Council denied Marks' permit application solely in an effort to placate those members of the public who expressed 'religious' objections to the plaintiff's proposed use of his property, it thereby acted 'arbitrarily' and 'capriciously.' ").

[200] Ordinance § 7.7.(c).

[201] Pl.'s Ex. E, p. 2.

the defendants denied Henry's application for a conditional use permit because Henry did not exercise his right to rebut the public's comments.

4. *Conclusion.*

Therefore, the Court DISMISSES plaintiff's substantive due process claim.

C. *Third Cause of Action: Equal Protection (Rational Basis).*

1. *Plaintiff's Argument.*

Henry argues that the defendants violated his rights under the Equal Protection Clause by treating his application for a conditional use permit different from Lowe's application for a conditional use permit in two ways. First, whereas there were no unresolved compatibility issues with respect to Lowe's application, there were sixteen unresolved issues with respect to Henry's application. Second, the defendants improperly denied Henry's application for a conditional use permit by acting upon public bias, prejudice and fears.

2. *Discussion of Law.*

The Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws".[202] The Court reviews Equal Protection claims under the standards set forth in *Sylvia Dev.*

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[202] U.S. CONST. amend. XIV.

Corp. v. Calvert County.[203] First, the Court considers whether the state has created a classification that singles out a particular group of individuals for special treatment. This classification may appear either on the face of the legislation or may be a classification that the state intentionally applied in the administration of the laws.[204] Importantly, therefore, if the plaintiff cannot establish disparate treatment with respect to another similarly situated party, then the plaintiff cannot establish an equal protection claim.[205]

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[203] 48 F.3d 810, 818-25 (4th Cir.1995); *see 2BD Assocs. Ltd. P'ship v. County Comm'rs for Queen Anne's County,* No. 98-1014, 1998 WL 559711, at *3 (4th Cir. Sept.2, 1998) (stating that the Court considers Equal Protection challenges under the analysis set forth in *Sylvia*).

[204] *Sylvia Dev. Corp.,* 48 F.3d at 819. The Fourth Circuit set forth the following factors to determine whether the defendants have intended to discrimination:

> (1) evidence of a "consistent pattern" of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings.

Id. at 819 (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252, 266-68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Talbert v. City of Richmond,* 648 F.2d 925, 929 (4th Cir.1981)).

[205] *Id.* at 825 ("[A]n equal protection claim must be rooted in an allegation of unequal treatment for similarly situated individuals"); *see also Christ College, Inc. v. Board of Supervisors,* No. 90-2406, 1991 WL 179102, at *5-6 (4th Cir. Sept.13, 1991).

Second, if the plaintiff has identified such a classification, then the Court analyzes the state's actions under the appropriate degree of scrutiny.[206] "As a general proposition, legislation will be sustained if the classification utilized by the statute is 'rationally related to a legitimate state interest.' "[207] "When a statute, however, classifies by race, alienage, or national origin, it is subjected to 'strict scrutiny and will be sustained only if [the legislative means] are suitably tailored to serve a compelling state interest.' "[208] Importantly, the state must have used the classification in order to assert a proper equal protection claim.[209]

3. *Analysis.*

Henry has not established the first element of an Equal Protection claim; he cannot establish that both he and Lowe were similarly situated.[210] Both Lowe and Henry had to operate within the five step framework for applying for a conditional use permit.[211] However, the Ordinance classified the properties, upon which both Henry and Lowe

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[206] *Sylvia Dev. Corp.*, 48 F.3d at 820.

[207] *Id.* (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)).

[208] *Id.* (alterations in original).

[209] *Id.* at 825 ("[A] showing of such disparate treatment, even if the product of erroneous or illegal state action, is not enough by itself to state a constitutional claim."); *see also Forest Ambulance Serv., Inc. v. Mercy Ambulance of Richmond, Inc.*, 952 F.Supp. 296, 306 (E.D.Va.1997) ("Because *Sylvia* requires that classification have been a factor before the equal protection clause is implicated, our plaintiffs fail to state a claim.").

[210] *See supra* notes 204-05.

[211] Ordinance § 7.3(b)(2)-(6).

sought conditional use permits, in different Zoning Districts. The Ordinance classified Henry's property, upon which he sought a conditional use permit, as a "Rural-Agricultural District."[212] The Ordinance classified Lowe's property, upon which he sought a conditional use permit, as a "Residential-Growth District."[213] Consequently, the properties, upon which Henry and Lowe applied for conditional use permits, were not similarly situated.

This difference in Zoning Districts is significant because the Ordinance directs the participants at the Compatibility Assessment Meeting to review non-exhaustive compatibility criteria[214] in reference to the Zoning District within which the applicant seeks a conditional use permit.[215] The participants reviewed Henry's application in reference to the stated purpose of the "Rural-Agricultural District": "to provide a location for low density single family residential development in conjunction with providing continued farming activities."[216] Additionally, the participants reviewed Lowe's application in reference to the stated purpose of the "Residential-Growth

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[212] *Id.* § 5.7.

[213] *Id.* § 5.4; Pl.'s Ex. K.

[214] Ordinance § 7.6(b)(1)-(8).

[215] *See, e.g., id.* §§ 7.6(b)(2) (compatibility with existing development), 7.6(b)(4) (transportation patterns in the area) & 7.6(b)(5) (consistency with land use in areas immediately adjacent to the proposed development).

The Public Hearing, if required, *id.* § 7.6(f), focuses on the unresolved compatibility issues raised at the prior Compatibility Assessment Meeting, *id.* § 7.6(e).

[216] *Id.* § 5.7.

District" "to provide for a variety of residential uses . . . [and the encouragement of] commercial growth".[217]

For this reason, it is immaterial, under the Equal Protection Clause analysis, that there were unresolved compatibility issues with respect to Henry's application and that there were no such unresolved compatibility issues with respect to Lowe's application. Accordingly, Henry cannot establish that the defendants have created a classification that singles out a particular group of individuals for special treatment.

However, even if Henry could establish that the properties upon which both Henry and Lowe applied for conditional use permits are similarly situated, Henry cannot establish that the defendants' decision denying his application was not "rationally related to a legitimate state interest."[218] On the contrary, the Board's seven page decision and order entered February 19, 1998, provides detailed findings of fact and conclusions of law. The decision and order indicates that Henry's plan to build townhouses did not conform with both the purposes of the Rural-Agricultural District and the housing in close proximity to the townhouses. The decision and order concludes that the townhouses would, therefore, violate the purpose of the Rural-Agricultural District. Importantly, the decision and order does not cite public bias, prejudice and fears as grounds for denying Henry's

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[217] *Id.* § 5.4.

[218] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

application.[219] This is sufficient to pass muster under the lenient rational basis test.[220]

4. *Conclusion.*

Therefore, the Court DISMISSES plaintiff's equal protection (rational basis) claim.

D. *Fourth Cause of Action: Equal protection (Suspect Classification).*

1. *Plaintiff's Argument.*

Henry argues that the defendants violated his rights under the Equal Protection Clause by denying his application for a conditional use permit for racial reasons. Specifically, he alleges that the defendants denied his application because of a fear that racial minorities would inhabit the planned townhouses in the same manner that racial minorities inhabited the Maddex Court.

The parties first dispute whether Henry, a white male, has standing to assert a suspect classification challenge to an equal protection claim.

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[219] Defs.' Ex. 10.

[220] On appeal, the Circuit Court of Jefferson County, by Order dated August 27, 1999, affirmed the Board's seven page decision and order entered March 19, 1998, Defs.' Ex. 13. The Circuit Court determined that "[t]he findings of fact made by the [Board] have sufficiently set forth the factual basis for its determination so that this Court has been able to determine that the [Board's] decision conforms to the standards of the ordinance detailed in Section 6.2 of the Zoning Ordinance." Defs.' Ex. 13.

2. *Discussion of Law.*

In *Scott v. Greenville County*,[221] the Fourth Circuit held that a developer, who was not a racial minority, had standing to assert the rights of prospective minority tenants victimized by alleged racial discrimination.[222] The Fourth Circuit first held that the Constitutional requirement of standing was met through the denial of the developer's building permit to build multi-family low-income housing.[223] Second, the Fourth Circuit held that the developer possessed a personal stake in the particular rights for which he sought relief.[224] Importantly, the Fourth Circuit held that the developer need not be a member of a racial minority[225] and, as well, the developer need not show nor allege that minorities will in fact reside in the planned development.[226]

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[221] 716 F.2d 1409 (4th Cir.1983).

[222] *Id.* at 1414-16.

[223] *Id.* at 1414-15 ("Scott's claimed injuries stem from the denial of a building permit for his proposed multi-family housing complex, and he fairly alleges that denial of the permit was due to the intervention of the defendants in various capacities into the permit issuance process. Thus we think the constitutional requirement of standing has been met.") (footnote omitted).

[224] *Id.* at 1415 ("Scott as the developer is a proper plaintiff to assert the rights of prospective minority tenants victimized by the alleged racial discrimination.").

[225] *Id.* ("[S]tanding to assert that discriminatory government action violated the equal protection clause is not lacking simply because the plaintiff is not a member of a minority.").

[226] Scott also need neither allege nor show that members of a minority group will in fact reside in the proposed housing in order to satisfy standing requirements. The heart of Scott's racial discrimination claim is that he was singled out for adverse treatment because defendants believed he was willing to contract with and otherwise associate

(Continued on following page)

3. *Analysis.*

Henry has standing to assert this equal protection claim. Although he is not a member of a racial minority, the defendants denied his application for a conditional use permit to build the townhouses.[227] As well, Henry has a personal stake to assert the rights of the potential inhabitants of the townhouses.[228]

However, Henry has not provided any contemporaneous evidence in support of his claims that the defendants denied his application for a conditional use permit for race-based reasons. At most, plaintiff provides hearsay evidence that, when the neighbors around the Town Run Property circulated the petition on or about March 20, 1994,[229] there were some concerns by unnamed people that people of diverse backgrounds may inhabit the townhouses.[230] Henry does not offer any evidence that the

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with blacks and other minorities through the building of low-income housing. If allegations that public officials were motivated by racial animus in harming the plaintiff-developer were not themselves enough to confer standing under § 1983, then such officials could almost uniformly foreclose potential liability by successfully destroying the proposed development's prospects at a stage too early for actual occupancy to be ascertained. The uncertainty surrounding carrying any large-scale housing development to fruition – even assuming all public approvals – has not undermined the standing of developers who could not guarantee actual patronage by minorities.

Id. at 1415-16 (footnote omitted).

[227] *See supra* note 223.

[228] *See supra* note 224.

[229] Pl.'s Ex. O.

[230] Q. Did you hear anything about either Hispanics or blacks living there?

(Continued on following page)

defendants considered race in evaluating Henry's application for a conditional use permit.[231]

4. *Conclusion.*

Therefore, the Court DISMISSES plaintiff's equal protection (rational basis) claim.

A. Just, more or less, it was never mentioned as far as blacks, Hispanics et cetera. They were, more or less, saying it would be a more wide verse [sic] of people moving in.

Q. What did you take that to mean?

A. I actually look at it to be as, more or less, not so much the race, but a lot of the, more or less, single family parents trying to raise large families on their own, and it's hard making ends meet. Those type of things I could see as far as being mor [sic] of an area where you have lower income people coming in and trying to make ends meet.

Q. Did you ever hear any comments of Lee Morgan about either niggers or Hispanics living there or drug dealers?

A. No.

Dep. of Billmyer, pp. 18-19.

[231] Q. At the public meeting, do you remember anyone standing up and saying that the Board, the Planning Commission, should not approve Mr. Henry's project because of the possible influx of racial minorities into the Shepherdstown area?

A. I don't recall that, no.

Q. Do you remember anyone getting up and telling the Jefferson County Planning Commission that they should not approve Mr. Henry's project because of single parents moving into the neighboorhood?

A. No.

Id. p. 38.

V. ORDER

For the above stated reasons, the Court **ORDERS** that:

1. the defendants' renewed motion for summary judgment[232] is **GRANTED**;

2. the defendants' motions *in limine*[233] are **DISMISSED AS MOOT**;

3. the plaintiff's motion to stay[234] is **DISMISSED AS MOOT**; and

4. the plaintiff's motion to continue[235] is **DISMISSED AS MOOT**; and

5. this civil action is **DISMISSED** from the active docket of this Court.

The Clerk is directed to transmit certified copies of this Order to the counsel of record.

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[232] Doc. # 86.

[233] Docs. #106-1, -2, -3, -4, -6, -8, -9, -10, -11, -12.

[234] Doc. # 136-1.

[235] Doc. # 136-2.

Supreme Court, U.S.
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No. 02-359

In the

Supreme Court of the United States

AUBREY E. HENRY,

Petitioner,

v.

JEFFERSON COUNTY
PLANNING COMMISSION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae
Pacific Legal Foundation

16 pp

QUESTION PRESENTED

The lower court decided that a fee simple landowner applying for a permit to use his land does not have a property interest, and is therefore not entitled to substantive due process in the permitting process, stating: "We have made clear that when a 'land-use regulation[] grant[s] discretion to [government] officials with regard to approval of the proposed development, [a landowner] possess[es] no property interest protected by the Fourteenth Amendment.' *Gardner v. City of Baltimore*, 969 F.2d 63, 64 (4th Cir. 1992)."

Is a landowner seeking a permit entitled to substantive due process protection even when he does not have a "vested right" to the permit?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 29 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by the government regulation of private property.

Pacific Legal Foundation attorneys have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 25 years. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

Pursuant to Supreme Court Rule 37, written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Amicus adopts Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT AND INTRODUCTION

Must a landowner first obtain a vested right to utilize real property in a particular manner before rights of substantive due

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

process attach to his right to use the property in that particular manner? To ask this question is to demonstrate the causal flaw in its logic. If one can assume, as this Court has previously held, that the ability to put property to reasonable use is a right rather than a government benefit, then the protections of the Due Process Clause must be attached to the permitting process itself. Due process rights that attach because a real property interest is involved is in contrast to those circumstances where the underlying rights arise out of governmental benefits—where there is no inherent *right* to the benefit in the first place—where there is no *right* until the government creates the right. In *those* circumstances, there must be established a right in the benefit first in order to bring a challenge based on the Due Process Clause. However, where traditional property rights are at issue, those rights which are specifically referred to in the Due Process Clause, it defeats the right itself to require an additional "entitlement" before the protections of the Due Process Clause are to attach. Otherwise, property rights would truly become a "poor relation" of the other rights that are specifically enumerated in the Constitution. Some courts have understood this distinction, others have not. This has left the ability of landowners to seek protection under the Due Process Clause largely to geographic chance. This conflict in the state and lower federal courts can only be resolved by this Court. In fact, this Court is currently addressing this very issue in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, Case No. 01-1269. For that reason alone, the petition for writ of certiorari should be granted with a final disposition held until this Court issues an opinion in that case.

I

THE CONSTITUTIONAL RIGHT TO MAKE REASONABLE USE OF LAND IS A PROPERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE

The court below found that Henry had "failed to establish that he possesses a property interest in the conditional use permit to build the townhouses." Opinion of Fourth Circuit in *Henry v. Jefferson County Planning Commission*, Case No. 01-1948, May 7, 2002, *reproduced in* Petitioner's Appendix at App. 10. The court reasoned that "'[a]ny significant discretion conferred upon the local agency [to issue or deny the permit] defeats the claim of a property interest.'" *Id.* (citation omitted). That analysis—characterizing protected property interests in the land use context as including *only* those where a "landowner is *entitled* to a permit," *id.*, turns the vested rights analysis of *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), on its head by failing to recognize ownership of land as a constitutionally protected property interest. And the result is ironic. This Court's expansion of the definition of property interests protected by the Due Process Clause in *Roth* now serves as the basis for denying due process protection for the property interests specifically mentioned in the Due Process Clause of the Constitution as entitled to protection.

As discussed at length by Professor Mandelker, the notion that one must have a vested right to a permit before one can challenge a permit denial, a notion that he refers to as the "entitlement rule," has eluded a consistent treatment by the state and lower federal courts. It is also an issue that this Court has not yet addressed:

> Whether the Court would apply the entitlement rule to substantive due process claims brought by landowners is not clear. Opinions by the Court and individual Justices point in both directions, and the

> lower federal courts also disagree on whether substantive and procedural due process are equivalent.

Mandelker, Daniel R., *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part II: Discussions on the National Level: Chapter 2: Property Rights: Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 Wash. U. J.L. & Pol'y 61, 81-82 (2000).

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court announced the desire to rehabilitate the status of property protection under the Takings Clause from that of a "poor relation" compared to the other individual rights enumerated in the Bill of Rights. *Id.* at 392. Yet, various federal circuits, give short shrift to property rights when reviewing government regulations under the Due Process Clause.

The Due Process Clause guarantees against deprivations of "life, liberty, or property, without due process of law." U.S. Const. amends. V, XIV, § 1. Due process has long been understood to mean more than mere procedural formalities. Due process embraces the fundamental concept that certain government decisions must instead relate to a legitimate end of government and may not be made for no reason or for a bad reason. *See Lawton v. Steele*, 152 U.S. 133, 136-37 (1894); *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928). This concept is the essential difference between the rule of law and arbitrary government, between a government of laws and one of men. Certain public decisions by their very nature may be arbitrarily decided—such as the color of the wallpaper in city hall, the number of members of a board or commission, maybe even the generally applicable tax rate. But decisions to restrict the liberty of individuals or their enjoyment of their property must be justifiable by one of the legitimate ends of government, the promotion of health, safety, morals, or general welfare.

"Because we said so" might be an acceptable if somewhat disserving rule for a paternalistic relationship but has no place in a system of limited government designed to protect and defend the rights of free men and women.

Lower court decisions abound upholding restrictions on the use of property without regard for the reasons behind these restrictions. This treatment of property rights under Due Process review is ameliorated somewhat by the heightened protection for property rights mandated by the Takings Clause. Thus, regulation of the use and enjoyment of property must have more than a mere hypothetical connection with a legitimate end of government—it must *in actuality* "substantially advance" such an end. *Dolan*, 512 U.S. at 385; *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). This Court has thus recognized that the government's authority over private property is proper only when it *will further* a legitimate goal. If no such goal is furthered, then government cannot mandate a restriction on the use of property—unless it decides to condemn that property right.

The Takings Clause, however, is not a substitute for the protections of the Due Process Clause. The former guarantees only that Just Compensation be paid for the property taken, it does not stop government misconduct. The latter can invalidate the government action and could provide for the payment of actual damages to compensate for the personal injury inflicted upon an individual who has been the subject of unlawful treatment at the hands of the government. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985); *see also Walz v. Town of Smithtown*, 46 F.3d 162, 169-70 (2d Cir. 1995) (emotional distress and pain and suffering damages recovered for substantive due process violation); *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988)

(injunctive relief and "full tort damages" available under Due Process Clause).

Unfortunately, many courts act as if the same interests in property that are protected by the Takings Clause are not protected by the Due Process Clause. It is as if the word "property" has been erased from the Due Process Clause or at least substituted with the words "entitlement" so that the Constitution reads: "Nor be deprived of life, liberty, or *entitlements*, without due process of law." If this situation persists, the Takings Clause would remain the "poor relation" of the other explicit guarantees such as those in the First Amendment. *Henry* (or alternatively, the pending case of *Buckeye*) affords this Court the opportunity to correct the situation and provide firm guidance to the lower courts.

As one commentator has also noted:

> [L]andowners and developers are learning from federal court decisions in some of the circuits that, as the *degree of discretion* that can be exercised . . . increases, the less likely they will be deemed to have any "property interest" to protect, regardless of how arbitrarily that discretion is exercised in a particular case.

Blaesser, Brian W., *Substantive Due Process at the Outer Margins of Municipal Behavior*, 3 Wash. U. J.L. & Pol'y 583, 585 (2000).

II

THIS COURT SHOULD RESOLVE THE CONFLICTS OVER WHETHER OWNERSHIP OF PROPERTY IS A SUFFICIENT INTEREST TO RECEIVE DUE PROCESS PROTECTION

The *Henry* court adopted the notion that ownership of private property does not involve a property interest protected by the Due Process Clause. This decision cannot be dismissed

as an anomaly, as several Circuit Courts of Appeals have also rejected the basic idea that ownership of property entails use and enjoyment of that property. These courts look instead for a "vested right" or "entitlement" to a particular permit in order for Due Process protections to be triggered.

This question should have been settled long ago. In 1829, speaking through Justice Story, this Court held that the American Revolution settled it, resulting in a government for which it would be repugnant to its very nature that "the rights of property are left solely dependent upon the will of a legislative body without any restraint." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829). The *Wilkinson* Court declared that "[t]he fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred," *id.*, and stressed "the right of the citizens to the free enjoyment of their property lawfully acquired." *Wilkinson*, 27 U.S. (2 Pet.) at 657-58.

One of the defining characteristics of property ownership is that the owners are allowed to use their land. *See Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (In a due process challenge to a land use regulation, the Court held: "The right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution."). Although government may seek to restrict the right of the owner to use property in a particular way, the regulatory process must not be confused with the property interest at stake. *Palazzolo v. Rhode Island*, 533 U.S. at 627 (Government cannot define property by its regulations; "The State may not put so potent a Hobbesian stick into the Lockean bundle.").

The passage of the years has not undermined recognition of the fundamental basis of property ownership in the American political system. For example, in discussing the importance of procedural due process to reduce the likelihood of *substantively* unfair treatment of property owners, this Court explained: "[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's *right to enjoy what is his*, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (emphasis added).

Fundamental to the ownership of property is the use and enjoyment of that property, a concept that is embodied in the Constitution, and that implicates the Due Process Clause when restrictions affect that use and enjoyment. But the *Henry* court instead adopted the view that a property owner challenging the denial of a development permit must have an "entitlement" or vested right under state law—the right to receive that permit—in order to assert a Due Process claim. Petitioner's Appendix at App. 10. Unless an owner can demonstrate an entitlement under state law to proceed with a particular allowable use of the property, the owner cannot complain about the government's refusal to allow him to proceed, no matter how arbitrary, capricious, or unlawful that refusal may be.

A similar approach is taken by a number of federal Courts of Appeals. The Second, Sixth, and Eleventh Circuits all require the showing of the right to receive permission for a particular use of property in order to make out a Due Process

claim.[2] There is a sharp conflict between the circuits on this issue, as several courts of appeals have recognized that it is basic to ownership of property that one receive due process of law when use is restricted. *See, e.g., DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 601 (3d Cir. 1995) ("[O]ne would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership."); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) ("An owner may build on its land; that is an ordinary element of a property interest."). *See also Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 263 (1977) (purchaser's "right to be free of arbitrary or irrational zoning actions").

The circuits that do not consider property to be property protected by the Due Process Clause have relied on this Court's decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577. But *Roth* merely held that a "legitimate claim of entitlement" to a "benefit," in that case a nontenured teaching position, was needed to trigger certain procedural protections. *Id.* *Roth* was broadening the class of claims that come under Due Process protection, not contracting them, by recognizing that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 572. It is incredible that Roth could be read to mean that "actual ownership of real estate" is not protected by due process.

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[2] *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989) (must show no discretion in issuance of permit, or that issuance is "virtually assured" if under "narrowly circumscribed" discretion); *Marine One, Inc. v. Manatee County*, 877 F.2d 892, 894-95 (11th Cir. 1989) (property owner lacked "vested right" to permit).

This approach misapprehends what is at stake in due process land use claims. Unlike a professor seeking continued employment, property owners are not claiming the right to a government-established benefit when they seek to make use of their property. *Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' "). One of the defining characteristics of property ownership is that the owners get to use their land. The permit process does not confer any benefits or rights upon the successful applicants. To the contrary, this process ***restricts*** existing rights to ensure that uses of property do not impair the rights of others. Given that the essence of property is the ability to exclude others from its use and enjoyment, it is ironic that so many courts have ruled that no property right exists until the owner has given up his preferences and agreed to uses acceptable to others.[3]

CONCLUSION

As Professor Mandelker has stated:

> No one gains in a legal environment where landowners suffer from arbitrary decision making or, conversely, where constitutional restrictions prevent necessary planning and land use regulation. Effective judicial review can establish constitutional guidelines that assure fair decisions and provide the necessary framework for land use policies. Access

[3] *See River Park*, 23 F.3d at 166 ("Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property. . . . Licenses, permits, and classifications are important to owners because they reflect governmental promises not to interfere with private uses of property, but let us not confuse a decision not to intervene with the property itself.").

> to the courts is essential for judicial review. The entitlement rule denies landowners that access when they claim that a land use decision violates substantive due process. The constitutional basis for this rule is problematic and courts should abolish it.

Mandelker, *supra*, at 97. This Court should grant the petition for writ of certiorari.

DATED: October, 2002.

Respectfully submitted,

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae
Pacific Legal Foundation

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No. 02-359

In The

Supreme Court of the United States

AUBREY E. HENRY,

Petitioner,

v.

JEFFERSON COUNTY PLANNING COMMISSION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

DAVID A. DEJARNETT
Counsel of Record

MICHAEL D. LORENSEN
BRIAN M. PETERSON
BOWLES RICE MCDAVID GRAFF & LOVE, PLLC
101 South Queen Street
Post Office Drawer 1419
Martinsburg, West Virginia 25402-1419
Telephone: (304) 263-0836

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court should accept an appeal of a local zoning decision unsuccessfully challenged by the landowner on substantive due process grounds where the sole issue presented for review is whether the landowner possessed a protectable property interest, and where the district court held that even if the landowner *did* have a protectable property interest, his substantive due process rights were not violated because the decision was not arbitrary and capricious?

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STATEMENT OF THE CASE AND FACTS

The Jefferson County Planning and Zoning Commission denied, by unanimous vote, Aubrey Henry's application for a conditional use permit to build a 76-unit townhouse development on 9.8 acres of land in Jefferson County, West Virginia. Henry sued the Commission and others, asserting that the local zoning ordinance was unconstitutionally vague on its face and that the denial of the permit to build the townhouse project amounted to an unconstitutional taking of his property without just compensation and violated his due process and equal protection rights. The District Court granted summary judgment to the defendants on the vagueness challenge to the zoning ordinance and dismissed Henry's other claims on the grounds of *Burford* abstention. In reviewing that decision in an earlier appeal, the Court of Appeals affirmed the ruling that the ordinance was not unconstitutionally vague, vacated the dismissal of the remaining claims, and remanded for further proceedings. The District Court then granted summary judgment to the defendants on the remaining claims, and Henry appealed for a second time. On the second appeal, Henry abandoned his equal protection claim, leaving only the takings claim and the substantive due process claims for the Court of Appeals' review. The Court of Appeals affirmed the District Court's grant of judgment to the defendants on the substantive due process claim and vacated the judgment on the takings claim, finding that the latter claim was not ripe for review. The sole issue Henry now presents for this Court's review is the judgment in favor of the defendants on the substantive due process claim.

Aubrey Henry is part owner of a 13.69-acre tract of land located in Jefferson County, West Virginia. Henry

owned and operated a restaurant on this property beginning in 1979, when he took over the restaurant from his parents. In 1988, Jefferson County enacted a new Zoning Development and Review Ordinance which zoned the property as a Rural-Agricultural District. This district is for low-density, single family residential development in conjunction with farming activities. Although Henry's restaurant was a non-conforming use under the new ordinance, he was permitted to continue operating the restaurant under a grandfather clause. In 1993, the restaurant burned to the ground. Henry discussed rebuilding the restaurant with Paul Raco, the Director of the Jefferson County Planning and Zoning Commission. According to Henry, Raco told him that he should not bother applying for a permit to rebuild the restaurant because he would not be able to satisfy a number of necessary conditions. Instead, Raco allegedly told Henry to submit an alternative plan to build townhouses. If this was approved, then supposedly it would be easier for Henry to get approval at a later time to rebuild his restaurant.

Allegedly in reliance on this advice, Henry in early 1994 sought a conditional use permit for a 76-unit townhouse project on 9.8 acres of the property. Because the land had reverted to agricultural use after the restaurant burned down, Henry's proposed use was not allowed as of right. Henry properly sought a conditional use permit under Jefferson County's Development Review System. After processing Henry's proposal according to this system, the Commission unanimously voted to deny the permit. The denial was based on the project's high housing unit density (which was much greater than the density in the surrounding area), its effect on the adjacent park, and its general incompatibility with the neighborhood.

In his Statement of the Case, Henry has made several inaccurate statements regarding his application for a conditional use permit. First, Henry states that "[i]n the Rural-Agricultural District, townhouses are allowed, after obtaining a conditional use permit, based upon an objective point scoring system, known as the Development Review System ('system')." (Pet. 3-4). This statement oversimplifies the requirements for obtaining a conditional use permit. As the District Court's decision in this case explains,

> [t]he Ordinance sets forth five steps in reviewing an application for a conditional use permit: (1) the Planning and Zoning Staff evaluation of the Development Review System; (2) the Compatibility Assessment Meeting; (3) Public Hearings; (4) Planning and Zoning Commission's decision on the application; and (5) the Board of Zoning Appeals' decision.

Henry v. Jefferson County Planning Comm'n, 148 F. Supp. 2d 698, 699 (N.D. W.Va. 2001).

Next, Henry states that a crowd of 80 people showed up at the public meeting "to protest the granting of the permit because low income people would live there and use the public park next to the project." (Pet. 4) However, the record reflects that the concerns voiced at the meeting addressed a host of concerns, including management of storm water drainage, the ability of the local waterways to handle the increase in sewage effluent, the possible adverse effects of the project on the cultural and historic character of the area, the increase in automobile traffic, and the effect the increase in population would have on local schools. *See Henry*, 148 F. Supp. 2d 698 at 701. Henry's representation that 80 people turned out to

protest the creation of low income housing in their area is misleading.

Henry also states that "[t]he Commission had already saddled the project with conditions designed to keep these 'lower income' families out of, and from using the publicly-operated park next door." (Pet. 4) However, the Commission did not "saddle" the project with any conditions at all–it denied, without conditions, the issuance of a permit. *Henry,* 148 F. Supp. 2d at 701-702. The concerns raised at the public hearing were not "conditions" imposed upon Henry's project. They were compatibility factors considered by the Commission in deciding whether or not to approve the project, deny it, or approve it with conditions. Therefore, Henry's contention that the Commission imposed conditions on his project is incorrect.

Henry next claims that "[t]he protesting crowd was out-of-control, and shouted [him] down . . . whenever he tried to speak in his defense." (Pet. 4) Thus, Henry leads this Court to believe that he was not afforded a fair opportunity to speak in defense of his proposal. What he fails to mention is that at three public hearings (held on April 26, 1994, May 24, 1994, and August 18, 1994), Henry failed to provide any evidence in support of his project that would address the concerns raised by the public. Henry had nearly five months from the initial hearing to gather material or information to contradict the allegations of incompatibility made by the public. If he truly feared for his life, as he suggests (Pet. 4), he had ample opportunity to hire legal counsel to make his case for him. Instead, he chose to squander those three opportunities, and his permit application was denied.

Henry also claims that "the Commission denied the permit referring to the danger the project would create for the neighboring publicly-operated park." (Pet. 5) This is an incomplete statement. The record shows that the stated reasons for the denial were "the project[']s density; its effects on the Town Run Marsh and Morgan Grove Park; and, its incompatibility with the neighborhood." *Henry*, 148 F. Supp. 2d at 702. To the extent Henry's Statement of the Case suggests otherwise, it is incorrect.

Pursuant to state law procedure, Henry appealed the Commission's decision to the Jefferson County Board of Zoning Appeals. The Board affirmed the Commission's findings and decision. Henry then challenged the Board's decision through the West Virginia state court system. He sought certiorari in state circuit court, which affirmed the Commission's decision. Henry then sought review in the Supreme Court of Appeals of West Virginia, which remanded the case to the Board with instructions that the Board support its decision with more thorough fact-finding. The Board gave Henry the opportunity to present more evidence, but Henry requested instead that the Board expedite the decision without another hearing. The Board then issued a six-page decision affirming the denial. The Board concluded that the Zoning Commission had properly followed the public hearing procedures set out in the ordinance. It also concluded that the proposed development, with a density of 7.75 housing units per acre, was incompatible with the relative density of the surrounding area, which consisted mainly of one single family home per two acres or more of land. The Board found the proposed development incompatible with the purpose of the Rural-Agricultural District. Henry again sought certiorari in the circuit court, which affirmed the Board's decision. The

Supreme Court of Appeals of West Virginia denied review, and although a direct appeal to this Court was possible, no appeal was taken. Throughout this state review process, Henry challenged the legal and factual sufficiency of the Commission's decision. At no time during this process did Henry seek compensation for the denial of his permit. *See, e.g., Henry v. Jefferson County Planning Comm'n,* 201 W.Va. 289 (1997).

Henry also brought suit in federal district court, challenging the constitutionality of the ordinance, alleging an unconstitutional taking of his property, and claiming due process and equal protection violations. As noted above, the Court of Appeals affirmed the District Court's ruling that the ordinance was not unconstitutionally vague in a prior appeal, but it remanded Henry's remaining claims for further proceedings. On remand, the District Court granted summary judgment to the defendants on these claims. In finding that Henry's substantive due process rights were not violated, the District Court held that (1) Henry had "at best, a unilateral expectation and not a protected property interest"; and (2) that "even if Henry could establish a protectable property interest . . . he [could not] establish that the defendants[']actions were so far beyond the outer limits of legitimate state action that no [process] could cure the defendants' actions." *Henry*, 148 F. Supp. 2d at 714. Henry appealed the District Court's ruling on his takings and substantive due process claims, but he did not appeal the ruling on the equal protection claim. The Court of Appeals affirmed the District Court's grant of judgment to the defendants on the substantive due process claim and vacated the judgment on the takings claim, ordering that the claim be remanded for the purpose of dismissal because the claim was unripe.

Henry now petitions this Court for a review of a single aspect of the substantive due process decision: whether as part of his substantive due process claim he is required to show a legitimate claim of entitlement to the conditional use permit he seeks. (Pet. i)

REASONS FOR DENYING THE WRIT

I. THE QUESTION RAISED BY THE PETITIONER IS NOT PROPERLY BEFORE THIS COURT.

Henry's Petition for Certiorari should be denied because he has not previously raised the issue he attempts to raise in this appeal. The sole issue presented to this Court for review is whether a landowner seeking a discretionary zoning permit must show a property interest in the permit itself in order to make out a substantive due process claim against the government. (Pet. i) The Petitioner argues that a split of authority among the various courts of appeals has emerged, and that instead of relying on its own precedent in *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992), the Fourth Circuit Court of Appeals should instead have relied on the Third Circuit's decision in *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995). However, none of Henry's prior briefs before the lower courts ever mentioned this split of authority or advocated the position stated in *DeBlasio*. Henry did not cite *DeBlasio* in his brief before the Court of Appeals, nor did he advance the theory that ownership of the property, by itself, is a sufficient "property interest" to trigger

substantive due process protection in a zoning permit case.[1]

In fact, the argument Henry advances in his Petition was raised only by *amicus curiae* the Pacific Legal Foundation before the Court of Appeals. This Court has stated in the past that "it is our practice 'to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari.' *Bragdon v. Abbott,* 524 U.S. 624, 638, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998)." *Owasso Independent School District No. I-011 v. Falvo,* 534 U.S. 426, 431, 122 S. Ct. 934, 938, 151 L. Ed. 2d 896, 903 (2002). Henry may argue that the issue was properly raised at least before the Court of Appeals because the Pacific Legal Foundation raised the issue in its *amicus curiae* brief. However, the Court of Appeals has noted that "[a]n appellant and an amicus may not split up the issues and expect the court to consider that they have all been raised on appeal." *United States v. Buculei*, 262 F.3d 322, 333 n.11 (2001); *see also id.* at 333 n.11 ("An issue waived by appellant cannot be raised by amicus curiae.") (internal citations omitted). This Court has also held that arguments raised by *amici curiae* that are not raised by the parties should not be considered. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60, n.2, 101 S. Ct. 1559, 67 L. Ed. 2d 732 (1981) (noting that the Court does not decide issues raised by *amici* that were not decided by the court of appeals or argued by the interested party); *Bell v.*

[1] Henry argued before the Court of Appeals that he had a property interest in the permit, and in a footnote, he argued alternatively that he was not required to show a property interest at all.

Wolfish, 441 U.S. 520, 531, n.13, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (same). Therefore, the raising of the issue by the *amicus curiae* in this case and in the Court of Appeals did not properly preserve the issue for appeal, and the writ should be denied.

II. THE ISSUE RAISED IN THE PETITION HAS NOT BEEN RAISED IN *CITY OF CUYAHOGA FALLS v. BUCKEYE COMMUNITY HOPE FOUNDATION.*

Henry has argued as a reason for granting the writ in this case that "[t]he Court recently granted certiorari on essentially the same due process issue as the one involved here in the case of *City of Cuyahoga Falls, OH et al. v. Buckeye Community Hope Foundation,* No. 01-1269, on June 24, 2002 ("*Buckeye* case")." (Pet. 6) However, the issue raised by Henry's Petition is not raised in the *Buckeye* case.

As mentioned above, the Petition herein seeks to resolve a split among the circuit courts of appeals on the issue of whether a landowner challenging a denial of a discretionary zoning permit on substantive due process grounds must prove a property interest in the permit itself rather than ownership of the affected land. According to the Petition, both the Court of Appeals for the Sixth Circuit (where the *Buckeye* case originated) and the Court of Appeals for the Fourth Circuit (where this case originated) apply the *Roth* entitlement analysis[2] to substantive

[2] *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an

(Continued on following page)

due process challenges of zoning decisions and require the landowner to prove a property interest in the permit denied to him. *Compare Triomphe Investors v. City of Northwood,* 49 F.3d 198, 202-04 (6th Cir. 1995) *with Gardner,* 969 F.2d 63, 68-69 (4th Cir. 1992). A review of the Petition for Writ of Certiorari and Brief in Opposition in *Buckeye* shows that neither party in that case asks this Court to examine the propriety of applying *Roth* in this manner in zoning cases involving substantive due process challenges. The appellant in *Buckeye* argues that no property interest exists in the land use permits under *Roth* and *Gardner*, while the Appellee argues that a property interest does exist under *Roth* and that *Gardner* is distinguishable. Henry's attempt to equate his case with one the Court has agreed to hear in *Buckeye* should therefore be rejected. The fact that the Pacific Legal Foundation has filed *amicus curiae* briefs advocating the same position in both cases does not make the two cases alike.[3]

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abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.").

[3] It appears from the briefs filed in this Court thus far in *Buckeye* that unlike Henry, none of the parties in *Buckeye* is interested in taking up the Pacific Legal Foundation's cause.

III. THIS CASE IS A PARTICULARLY POOR CASE IN WHICH TO RESOLVE A SPLIT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEALS.

If this Court were inclined to resolve the split of authority among the circuit courts of appeals on the property interest issue,[4] this case would serve as a particularly poor vehicle, even when considered in conjunction with *Buckeye*. First, as mentioned above, the Courts of Appeals for the Fourth and Sixth Circuits are on the same side of the split. *Compare Triomphe*, *supra* with *Gardner*, *supra*.

Second, the dismissal of the substantive due process claim was not based solely on the absence of a property interest in the conditional use permit Henry sought. The District Court held that even if Henry *did* have a protectable property interest, his substantive due process claim should nevertheless be dismissed because the defendants' actions were not so far outside the legitimate bounds of state action that no process could cure the defendants' actions. *Henry,* 148 F. Supp. 2d at 714. Thus, even if this Court granted the writ and adopted the minority position advocated by the Petitioner, the judgment should still be affirmed because the decision to deny the permit was not

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[4] The Court had a prime opportunity to decide the split when it matured in 1995, but it declined. *Compare DeBlasio v. Zoning Bd. of Adjustment,* 53 F.3d 592, 596-601 (3d Cir.) (establishing substantive due process protection for landowner's property without necessity of demonstrating property interest in zoning permit), cert. denied, 116 S. Ct. 352 (1995) *with Triomphe Investors v. City of Northwood,* 49 F.3d 198, 202-04 (6th Cir.) (applying "legitimate claim of entitlement" test to deny protection to landowner), cert. denied, 116 S. Ct. 70 (1995).

arbitrary and capricious. The fact that the issue raised in Henry's Petition may be of nationwide importance (*see* Pet. 17) is irrelevant because the outcome of the case does not depend on the answer to the question presented. Petitioner's invitation to consider a non-dispositive, albeit interesting, constitutional issue solely because other landowners in future cases might benefit from the creation of a new general rule must be declined. As this Court explained in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926):

> In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

Euclid, 272 U.S. 365, 397.

IV. THE LOWER COURTS APPLIED THE APPROPRIATE LEGAL STANDARD AND CORRECTLY HELD THAT PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

Finally, the Court should decline the Petition because the courts below applied the correct standard and reached

the correct conclusion. The minority position stated in *DeBlasio* has little to recommend it. To allow any landowner aggrieved by a decision of a local zoning authority to challenge the decision as an "arbitrary and capricious" violation of his right to due process would convert the federal courts to boards of zoning appeals.[5] This approach is inherently incompatible with judicial restraint. It allows courts to substitute their own judgment for the zoning authorities and states. It is axiomatic that not every violation of a state or local statute or ordinance amounts to an infringement of constitutional rights. *Paul v. Davis*, 424 U.S. 693, 700 (1976). Without judicial restraint, it is easy to turn any injury to persons or property by a government official into a due process claim. For this reason, the federal judiciary has been justifiably reluctant to extend due process protection to interests that are more properly protected in state courts construing state law. *Parratt v. Taylor*, 451 U.S. 527, 544 (1981). A due process claim requires more than an allegation that "the government decision was arbitrary, capricious, or in violation of state law. . . . Otherwise, every violation of state law could be turned into a federal constitutional tort." *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992). The practical effect of allowing any landowner to challenge the application of a zoning ordinance to his property by a substantive due process challenge would be to convert what should be purely state court issues into

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[5] *See Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) (stating that, had Boraas merely claimed violations of his property interests, without an equal protection claim, an arbitrary zoning ordinance would have been upheld because "our role is not and should not be to sit as a zoning board of appeals").

federal constitutional controversies. *See Gardner*, 969 F.2d 63, 68 ("federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes. [42 U.S.C.] Section 1983 does not empower us to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every run of the mill dispute between a developer and a town planning agency.") (internal quotations omitted).

The *DeBlasio* standard is also wrong because it improperly focuses the property interest analysis on the ownership of the property itself rather than the particular use that is being restricted. The Fourteenth Amendment prohibits the government from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Therefore, in a due process challenge, the focus should be on the particular property interest of which the landowner is being deprived.

In the present case, the government is not attempting to deprive Henry of ownership of his land.[6] Therefore, his ownership interest in the land itself is not sufficient to trigger substantive due process protection. Henry is not being deprived of ownership of his property; instead, he is being denied one particular use of that property. The focus of the property interest inquiry, then, is properly on the particular use being deprived – the right to build 76 townhouses in a low-density zone. Unless he can demonstrate entitlement to that use, the deprivation of that use

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[6] If the government *were* to deprive Henry of his ownership in land, his remedy would be through the Fifth Amendment, not the Fourteenth Amendment.

does not offend the Fourteenth Amendment. Therefore, it is proper to require him to demonstrate a property interest in the permit he seeks, which would authorize an otherwise unauthorized use. The majority of the circuit courts of appeals applying the *Roth* entitlement test to cases involving zoning and building permits is therefore correct.

Ownership of property does not entitle the landowner to use the property in any manner he chooses. The property interests protected by the Due Process Clause are "created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. 564, 577. *Roth* is applicable in a case such as this because what the landowner is seeking is the right to develop property in a manner inconsistent with a facially valid zoning ordinance.[7] A landowner's use of his property affects not only his property, but the surrounding properties as well. The neighboring landowners have the right to enforcement of the zoning ordinance, which is intended to preserve the character of the area. The right to own property may be a fundamental right, but the right to each and every *use* of the property is not because the reasonable limitations imposed by nuisance law and valid statutory exercises of the police power are inherent in the ownership. Making an exception to allow a use that is otherwise prohibited by a

[7] Henry's facial challenge to the constitutionality of the applicable zoning ordinance was found to be without merit by the Court of Appeals. *Henry v. Jefferson County Planning Comm'n*, No. 99-2122, 2000 U.S. App. LEXIS 12844 (4th Cir. June 9, 2000).

facially valid zoning ordinance is properly analyzed under *Roth* as it involves the discretionary expansion of development in a manner which impairs the rights of adjacent landowners.

In addition, the *DeBlasio* standard would allow landowners to bypass the federal ripeness requirement for regulatory takings set forth in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) by recharacterizing their regulatory takings claims as substantive due process claims. In this case, for instance, the Court of Appeals remanded Henry's regulatory takings claim with orders to dismiss, finding that "Henry's takings claim is not ripe because he has not sought just compensation from the State of West Virginia and been denied it." *Henry v. Jefferson County Planning Commission*, No. 01-1948, 34 Fed. Appx. 92, 98, 2002 U.S. App. LEXIS 8803 at *13 (4th Cir. 2002). The ripeness requirement ensures that state courts have the opportunity to review and, if needed, to provide a remedy for the effects of the land use decision. The Fifth Amendment (complete with its ripeness requirement), not the Fourteenth Amendment, is the proper basis for challenging a regulatory taking of property. Adoption of the *DeBlasio* standard would render the ripeness prerequisites meaningless. The requirement that the landowner show a property interest in the permit he seeks prevents the landowner from circumventing the state court ripening process, and helps ensure that land use decisions stay where they belong – in the state courts. The adoption of the *DeBlasio* standard would federalize an entire area of law in which the state courts provide adequate remedies.

CONCLUSION

The Petitioner's writ should be denied not only because he did not properly preserve the issue presented for appeal, but also because regardless whether the position he advocates is applied, the final judgment dismissing his substantive due process claim would be affirmed. The decision to deny his request for a conditional use permit was not arbitrary and capricious. *Henry*, 148 F. Supp. 2d at 714 ("even if Henry could establish a protectable property interest . . . he [could not] establish that the defendants['] actions were so far beyond the outer limits of legitimate state action that no [process] could cure the defendants' actions.") Moreover, the lower courts correctly applied the *Roth* entitlement standard in these circumstances, and they reached the correct conclusion in finding that Petitioner had no property interest in the permit he sought.

For these reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

DAVID A. DEJARNETT
Counsel of Record

MICHAEL D. LORENSEN
BRIAN M. PETERSON
BOWLES RICE MCDAVID
GRAFF & LOVE, PLLC
101 South Queen Street
Post Office Drawer 1419
Martinsburg, West Virginia
25402-1419
Telephone: (304) 263-0836

Attorneys for Respondents

No. 02-359

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In The

Supreme Court of the United States

AUBREY E. HENRY,

Petitioner,

v.

JEFFERSON COUNTY PLANNING COMMISSION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

JOHN C. YODER
Counsel of Record
YODER LAW OFFICES
P.O. Box 940
Harpers Ferry, WV 25425
Telephone: (304) 535-6842

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONER

The Respondents admit there is a conflict amongst the circuits over the property interest issue raised here, arguing against the standard followed in the Third Circuit, the Seventh Circuit, and more recently in the Ninth Circuit. (Opp. pp. 12-16) In order to try to dissuade the Court from addressing this conflict amongst the circuits, however, the Respondents mislead the Court by both misrepresenting the record below and by interjecting peripheral arguments in an attempt to confuse the issue raised here.[1]

The pertinent facts of this case, and the property issue raised, however, are simple and straightforward. According to even the Respondents' statement of facts, the Petitioner, Mr. Henry, owned and operated a commercial restaurant in fee simple from 1979 to 1988 before the Respondent Jefferson County passed a new zoning ordinance. Under the new zoning ordinance, his restaurant became a non-conforming use in the newly defined rural-agricultural district where it was located, and thus was grandfathered in as a nonconforming use. (Opp. pp. 1-2)

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[1] Due to the Respondents' misrepresentation of the record below, the Petitioner has lodged the Brief of Appellant and the Reply Brief in the case below, in the case of *Henry v. The Jefferson County Planning Commission, et al.*, No. 01-1948 (4th Cir., May 7, 2002), with the Clerk of the Court, so the Court can check the accuracy of Respondents' representations with the record below. Where the Petitioner references the Brief of Appellant or the Reply Brief, he is referring to these documents from the lower court, lodged with the Clerk, unless indicated otherwise.

When the restaurant subsequently burned to the ground in 1994, Mr. Henry went to the Director of the Planning and Zoning Commission of Respondent Jefferson County to apply for a permit to rebuild his restaurant. He was informed by the Director of the Planning and Zoning Commission that he should not bother applying for a permit to rebuild his restaurant, because under the new zoning ordinance, there was no provision to rebuild a nonconforming structure that was totally destroyed by fire, and that he would not be able to meet a number of conditions for rebuilding under the new zoning ordinance. Mr. Henry was further told by the Director of Planning and Zoning that he could meet the criteria under an objective point system established in the new zoning ordinance for building townhouses on his property, and the Director of Planning and Zoning suggested he apply for a permit to build townhouses instead of immediately seeking a permit to rebuild his restaurant. He also informed Mr. Henry that once he gained approval for building townhouses, it would be easier for him to gain approval to rebuild his restaurant under the objective point system. (Opp. p. 2)

Based upon this representation of the Director of the Planning and Zoning Commission, Mr. Henry applied for a permit to build 76 townhouses rather than a permit to immediately rebuild his restaurant. (Opp. p. 2) Although Mr. Henry qualified for the permit to build townhouses based upon a favorable score received under the zoning ordinance's objective point system, the permit was denied due to pressure asserted by a large, out of control crowd of protestors, in what could be described as a mob scene, that objected to townhouses being built next to a public park. The protestors feared that children of single parents, and

children from large families, living in the townhouses, would use and play in the public park next to the townhouses. This subjective reason for public opposition directly contradicted the objective point scoring system set forth in the ordinance, which gave the proposed project a more favorable score due to its close proximity to a public park. (Pet. 4-5; Brief of Appellant, p. 40)

Mr. Henry contended the denial violated his substantive due process rights. The district court, however, citing *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992), granted summary judgment against him on this issue, holding he did not have a property interest to challenge the denial of the permit. *Henry v. Jefferson County Planning Commission,* 148 F. Supp. 2d 698, 713-14 (N.D.W.Va. 2001), A-45-46. The U. S. Court of Appeals for the Fourth Circuit affirmed, stating:

> We have made clear that when a "land-use regulation[ ] grant[s] discretion to [government] officials with regard to approval of the proposed development, [a landowner] possess[es] no property interest protected by the Fourteenth Amendment." *Gardner v. City of Baltimore*, 969 F.2d 63, 64 (4th Cir. 1992).

(A-8) The issue presented is thus straightforward:

> Is a landowner seeking a permit entitled to substantive due process protection even when he does not have a "vested right" to the permit?

(Pet. i) In its attempt to avoid addressing this issue, and the sharp split amongst the circuits over this issue, the Respondents start out by grossly misrepresenting the record below, stating: "[Mr. Henry] has not previously raised the issue he attempts to raise in this appeal." (Opp. 7) This representation is patently false. The following

issue was raised and addressed in Mr. Henry's appeal to the U. S. Court of Appeals for the Fourth Circuit:

> Did the district court err in concluding that Mr. Henry was not entitled to due process because he has no property interest?

(Brief of Appellant, p. 2) This issue was then addressed on pages 33-47 of the Brief of Appellant filed in the Fourth Circuit. The respondents further misrepresent: "[N]or did [Henry] advance the theory that ownership of the property by itself, is a sufficient 'property interest' to trigger substantive due process protection in a zoning case." (Opp. 7-8) Contrary to this misrepresentation, Mr. Henry stated the following in his brief submitted to the Fourth Circuit:

> Mr. Henry contends . . . that when he owned the land, and when he (or his family) had been operating a commercial business on the property for twenty (20) years prior to the enactment of the Ordinance, he had a protectable property interest . . . without any additional need to show that he was entitled to the conditional use permit.

(Brief of Appellant, pp. 33-34). The Respondents also make the following misrepresentation about the record below:

> [N]one of Henry's prior briefs before the lower courts ever mentioned this split of authority or advocated the position stated in *DeBlasio*.

(Opp. 7) In truth, Mr. Henry made the following argument to the Fourth Circuit:

> [T]o the extent that there may be a circuit conflict between this circuit, with respect to its rulings in *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992) and *Sylvia Development Corp. v. Calvert County Md.*, 48

> F.3d 810 (4th Cir. 1995), on one side, and the Third Circuit's ruling in the more recent case of *De Blasio v. Zoning Board of Adjustment for Township of West Amwell,* 53 F.3d 592 (3d Cir. 1995), and the Ninth Circuit in the more recent case of *Schneider v. California Department of Corrections*, 151 F.3d 1194 (9th Cir. 1998), on the other side, Mr. Henry suggests this Circuit should re-examine its rulings in *Gardner* and *Sylvia* in light of the U.S. Supreme Court's more recent pronouncements regarding property rights in *Nollan* and *Palazzolo*. . . .

(Reply Brief, p. 14, n. 8) Clearly, Respondents misrepresent the record below. By making these blatantly false statements in their first point asserted in their opposition, the Respondents reveal the weakness of their following arguments.

The Respondents next argue, rather disingenuously, that the instant case does not involve the same property interest issue as the one raised and accepted for argument in *City of Cuyahoga Falls, et al. v. Buckeye Community Hope Foundation, et al.*, No. 01-1269 ("*Buckeye* case"). (Opp. 9) In this regard, Respondents state:

> A review of the Petition for Writ of Certiorari and Brief in Opposition in *Buckeye* shows that neither party in that case asks this Court to examine the propriety of applying *Roth* in this manner in zoning cases involving substantive due process challenges. The appellant in *Buckeye* argues that no property interest exists in the land use permits under *Roth* and *Gardner*, while the Appellee argues that a property interest does exist under *Roth* and that *Gardner* is distinguishable.

(Brief in Opposition, p. 10). This statement makes no sense, as it admits that both sides in *Buckeye* argue whether a property interest exists under *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972). Further, review of the briefs filed with the Court on the merits in *Buckeye* makes clear that it is the same issue. The identical issue is discussed and briefed on pages 29-31 of Petitioners' Brief on the Merits, and on pages 33-38 of the Brief for Respondents, filed with the Court in *Buckeye*. As the respondent in *Buckeye* correctly states in its brief regarding this issue:

> The circuits are clearly split on this issue. This Court can alleviate the confusion by affirming that the "right of [a landowner] to devote [his] land to any legitimate use is properly within the protection of the Constitution." The Court should recognize that ownership of land by itself entitles the landowner to freedom from arbitrary or irrational interference with the use of that land. . . .

(Brief for Respondents, p. 35, *City of Cuyahoga Falls, et al. v. Buckeye Community Hope Foundation, et al.*, No. 01-1269)

The Respondents next go on to argue that this is a poor case to address the property interest issue because even if relief is granted to Mr. Henry, the district court still will not decide in his favor. (Opp. 11-12) This is pure speculation. The Fourth Circuit did not address other parts of the district court's opinion in regard to substantive due process because it determined at the outset that Mr. Henry did not have a property interest under the *Gardner* standard, and therefore had no right to substantive due process. That was the basis for the decision in the Fourth Circuit, and not some other peripheral and

speculative argument that the Respondents seek to interject here for upholding the district court.

Contrary to what Respondents argue, this case presents even a stronger case for the property owner than in *Buckeye*, because in the instant case, Mr. Henry and his family operated a commercial business on the property for twenty (20) years prior to the time the zoning ordinance was enacted that deprived them of the continued use of the land for that business use or other alternative business uses. The Court should perhaps even consider dismissing the granting of the writ of certiorari on this same issue in *Buckeye* as being improvidently granted, and instead grant the petition for a writ of certiorari in the instant case.

In their last point, the Respondents finally address the inter circuit split, but pretend the Third Circuit is the only circuit on the other side of the split from the Fourth Circuit, stating: "The minority position stated in *DeBlasio* has little to recommend to it." (Opp. 13) As Mr. Henry points out in his Petition, however, there is a sharp and clear conflict amongst numerous circuits on this issue, and the Seventh and Ninth Circuits are on the same side of this conflict as the Third Circuit with its *DeBlasio* standard, in sharp contrast to the Second, Fourth, and Eleventh Circuits on the opposite side. (Pet. 9-17)

This sharp split amongst the circuits presents an issue of national importance that cries out to be resolved. The Respondents make no credible argument otherwise.

CONCLUSION

For the reasons stated above, the Court should **GRANT** this petition for writ of certiorari. In the alternative, this case should be placed on **HOLD** for the Court's decision in *Buckeye*, No. 01-1269, certiorari granted June 24, 2002, and scheduled for oral argument on January 21, 2002.

DATED: December 27, 2002.

Respectfully submitted,

JOHN C. YODER
YODER LAW OFFICES
P.O. Box 940
Harpers Ferry, WV 25425
Telephone: (304) 535-6842

Attorney for Petitioner